(1)

No. 99-9073-CFY Title: Paula L. Buford, Petitioner
v.
United States

Docketed: April 13, 2000 Court: United States Court of Appeals for the Seventh Circuit

Entry	Date	Proceedings and Orders
	Apr 10 2000	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due July 10, 2000)
	Apr 20 2000	Waiver of right of respondent United States to respond filed.
	Apr 26 2000	DISTRIBUTED for Conference of May 11, 2000
	May 8 2000	Response requested. (Due June 8, 2000)
	Jun 6 2000	Order extending time to file response to petition until July 10, 2000.
	Jun 22 2000	Brief of respondent United States in opposition filed.
	Jul 6 2000	REDISTRIBUTED for Conference of September 25, 2000
	Sep 26 2000	Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 13, 2000. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, December 13, 2000. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 29, 2000. Rule 29.2 does not apply. SET FOR ARGUMENT January 8, 2001. **********
	Oct 26 2000	Joint appendix filed.
	Nov 13 2000	Brief of petitioner Paula L. Buford filed.
	Nov 20 2000	Record filed.
	Dec 5 2000	CIRCULATED.
	Dec 8 2000	Record filed.
	Dec 13 2000	Brief of respondent United States filed.
	Dec 27 2000	Reply brief of petitioner Paula L. Buford filed.
	Jan 8 2001	ARGUED.

NO.: 99-9073

Supreme Court, U.S.
FILED
APR 10 2000
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

PAULA L. BUFORD, *PETITIONER,*

VS.

UNITED STATES OF AMERICA, *RESPONDENT.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the "*de novo*" or "deferential" standard of appellate review should be used in determining whether a defendant's prior convictions are "related" within the meaning of the Federal Sentencing Guidelines. The seventh circuit decision shows that prior to *Buford* the 1st, 5th, and 9th circuits reviewed "relatedness" determinations using a *de novo* standard, and six others used a "deferential" standard (2nd, 4th, 6th, 8th, 10th, 11th Cir.). *See U.S. v. Buford* at 201 F.3d 937, 941-942 (7th Cir. 2000). In *Buford* the seventh circuit elected to follow the minority and apply the *de novo* standard, creating a four to six split among the circuits, (Rule 10.a).

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover of the page. A list of all parties to the proceeding in the court whose judgement is the subject of this petition is as follows: N/A.

CORPORATE DISCLOSURE STATEMENT (Rule 29.6)

The defendant Buford is an individual who is appealing from her armed bank robbery sentence. She has no parent corporations.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts:**

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is

[X] reported at 201 Fed.3d 937 (2000); or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

The opinion of the United States District Court appears at Appendix B to the petition and is not reported

[ ] reported at _____; or,

[ ] has been designated for publication but has not yet been reported; or,

[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided this case was January 12, 2000.

[X] No petition for rehearing was timely filed in my case.

The jurisdiction of this Court is invoked under 28 U.S.C.§1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The sentencing guidelines define a Career Offender at U.S.S.G. §4B1.1:

§4B1.1 Career Offender.

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. If the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case shall be Category VI.

Offense Statutory Maximum		Offense Level
(A)	Life	37
(B)	25 years of more	34
(C)	20 years or more, but less than 25 years	32
(D)	15 years or more, but less than 20 years	29
(E)	10 years or more, but less than 15	24
(F)	5 years or more, but less than 10	17
(G)	More than 1 year, but less than 5 years	12.

§4B1.2(3)(B) requires that "two prior felony convictions" be "counted separately under the provisions of Part A of this Chapter" to count as two prior felony sentences within the meaning of the Career Offender guideline:

§4B1.2 Definitions of Terms Used in Section 4B1.1

...

(3) The term "two prior felony convictions" means ... (B) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). ....

§4A1.2 provides that if cases are "related", then they are counted as but one case. If cases are related, then they are counted as one prior sentence or conviction. This requirement is set forth in **§4A1.2(a)(2)** and **Application Note 3 to §4A1.2**, each of which is set forth below:

§4A1.2(a)(2) is set forth as follows:

§4A1.2 Definitions and Instruction for Computing Criminal History

(a) Prior Sentence Defined

...

(2) Prior sentences imposed in unrelated cases are to be counted separately. Prior sentences imposed in related cases are to be treated as one sentence for purposes of §4A.1.1(a), (b), and (c). ...

...

Application note 3 to §4A1.2 defines "related cases" as follows:

"3. *Related Cases*. Prior sentences are not considered related if they were for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense. *Otherwise, prior sentences [,] are considered related if they resulted from offenses that (1) occurred on the same occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing*. The court should be aware that there may be instances in which this definition is overly broad and will result in a criminal history score that under-represents the seriousness of the defendant's criminal history and the danger that he presents to the public. For example, if a defendant was convicted on a number of serious non-violent offenses committed on different occasions, and the resulting sentences were treated as related because the cases were consolidated for sentencing, the assignment of a single set of points may not adequately reflect the seriousness of the defendant's criminal history or the frequency with which he has committed crimes. In such circumstances, an upward departure may be warranted. Note that the above example refers to serious non-violent offenses. Where prior related sentences result from conviction of crimes of violence, 4A1.1(f) will apply.[1]"

[Emphasis supplied]

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1 4A1.1(f) states: Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was considered related to another sentence resulting from a conviction of a crime of violence, up to a total of 3 points for this item. Provided, that this item does not apply where the sentences are considered related because the offenses occurred on the same occasion.

STATEMENT OF THE CASE

Buford entered a guilty plea to armed robbery, 18 U.S.C. 2113 (a) & (d). A presentence investigation report (PSI) was prepared on January 27, 1999. The PSI detailed Buford's criminal history. It showed that she was convicted and sentenced on four counts of armed robbery in Milwaukee County on May 21, 1992, (case number F-92-0368). The sentences on counts four and five were withheld, and she was placed on 15 years concurrent probation. (PSI page 16, ¶67).

The PSI further showed that Buford was also sentenced in Milwaukee County, on the same date of May 21, 1992, to six years in prison on a case of possession of controlled substance - cocaine, with intent to deliver, case number F-92-0369.

The PSI showed that Buford had a total of 19 criminal history points, and was therefore in criminal history category VI, (PSI page 19, ¶79).

The PSI determined Buford had a total offense level of 22 if she was *not* a Career Offender, (PSI page 9, ¶24). Buford agrees with said determination that her offense level is 22.

The PSI then determined that Buford was a Career Offender pursuant to U.S.S.G. §4B1.1, and therefore her offense level was enhanced to level 31, (PSI pages 9-10, ¶25-28). Buford denies she is a Career Offender.

Buford was over age 18 at the time of the instant offense; her instant offense of armed bank robbery is a crime of violence; and said two prior Milwaukee County convictions were for a crime of violence or a controlled substance case. Buford would be a Career Offender if the two Milwaukee County cases are *not* "related". She would not be a Career Offender if they *were* related, because then she would only have one prior conviction for a crime of violence or a controlled substance offense.

Buford asserted in her trial court objections to the PSI that the two Milwaukee County cases were "related cases", within the meaning of Application Note 3 to U.S.S.G. §4A1.2 Definitions and Instructions for Computing Criminal History. Buford asserted the two Milwaukee County cases could not be counted separately, but had to be counted as one case for purposes of both the Career Offender enhancer and in computing her criminal history points.

The PSI determined that Buford had a criminal history of VI, and an enhanced offense level of 31 as a Career Offender, for a guideline sentencing range of 188-235 months, (see PSI page 31, ¶142).

If the two Milwaukee County cases were "related cases" then only three points could be added for the two of them, thus lowering her criminal history points from 19 to 16. She would still be at criminal history category VI. **Buford** agrees she is still in criminal history VI, but asserts her offense level is 22, for a guideline sentencing range of **84-105 months**.

Buford's principle assertions in her trial court objections to the PSI were that the cases were "related" (pursuant to Application Note 3 of the U.S.S.G. §4A1.2), because the charges against Buford were only separated into two separate case filings because one case was a drug case and Milwaukee County had a separate drug court, and that both cases were consolidated for plea and sentencing. Buford filed the pleadings, plea hearing transcripts, and transcript of the combined sentencing hearing in said Milwaukee County cases as evidence of said consolidation. Said documents are attached to the PSI, and PSI addendums, and are included in the appendix, (A 110-172) **2**.

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2 References to "*(A 110-172)*", etc., are to the *appendix filed with the court of appeals*.

The **trial court** rejected Buford's argument that the cases were "related", agreed with the PSI writer that Buford was at criminal history VI, Career Offender enhanced offense level 31, and guideline range **188-235 months**. The trial court then sentenced Buford to 188 months in prison.

The PSI treated Buford's two 1992 Milwaukee County convictions as separate cases, when in fact they are "related cases" within the meaning of the Sentencing Guidelines. The primary significance of treating them as separate cases was that Buford was incorrectly treated as a Career Offender, and her Offense Level was thereby increased from 22 to 31. She would have been a Criminal History VI regardless of this error. Her Guideline Sentencing Range was therefore increased from 84-105 months, to 188-235 months.

The two cases that the PSI incorrectly treated as separate convictions for purposes of the Career Offender enhancement were the cases where:

1. Buford was charged in Milwaukee County with five counts of armed robbery, case number F-92-0368; (A 110-112) and

2. Buford was charged with one count of possession of controlled substance – cocaine, with intent to deliver, case number F-92-0369, (A 131-132).

CHRONOLOGICAL ANALYSIS OF FACTS

A review of the chronology of the two Milwaukee convictions shows that they were consolidated for plea and for sentencing.

F-92-0368 "ARMED ROBBERY CASE"

03-18-90	Count 1 Date of Offense, (A 111).
05-18-90	Count 2 Date of Offense, (A 111).
12-04-91	Count 3 Date of Offense, (A 112).
12-09-91	Count 4 Date of Offense, (A 112).
01-23-92	Count 5 *Date of Offense*: ***same date as Drug Case***, (A 112).
01-23-92	***Date of Arrest:*** ***same date as Drug Case***, (A 117 & 185).
01-27-92	**Date of Complaint**, ***same date as Drug Case***, (A 112).
02-05-92	Preliminary Hearing: ***waived same date as Drug Case***, (A 118).
02-11-92	Scheduling Conference before Judge Wedemeyer; D.A. Simpson for state. Case set for Jury Trial before Judge Wedemeyer on September 8, 1992, (A 119).
04-07-92	Letter from defense attorney Huppertz confirming that ***Judge Geske agreed "to have the Armed Robbery charges consolidated into her [drug] court for the entry of a plea and sentencing."***, (A 122).
04-20-92	Guilty Plea Hearing before Judge DiMotto. D.A. Steinhafel for D.A. Simpson [3]

3 The docket sheet shows Judge Geske presided, (A 119). The Plea Hearing transcript shows Judge DiMotto presided, (A 123-130). Presumably Judge DiMotto was covering for Judge Geske, as the Huppertz letter (A 122) stated that the case was assigned to Judge Geske for both plea and sentencing.

05-21-92 Sentencing before Judge Geske. ***Same Date as in Drug Case.*** D.A. Simpson for state. As to counts 1 & 2 sentenced to 12 years each count concurrent, less credit for 118 days, (*same credit as Drug Case*). Count 3 dismissed. As to counts 3 & 4: court withheld sentence and placed Buford on probation for 15 years concurrent with each other and concurrent with sentences in counts 1 & 2, (A 149-172).

F-92-0369 "DRUG CASE"

01-23-92 Date of Offense at 3729 West Walnut Street. *Same date as Count 5 of Armed Robbery Case*, (A 131).

01-23-93 Date of Arrest. *Same date as Count 5 of Armed Robbery Case*, (A 135 & 185).

01-27-92 Date of Complaint, **same date as drug case**, (A 132).

02-05-92 Preliminary Hearing. ***Waived same date as Armed Robbery Case***, (A 136).

02-11-92 Scheduling Conference before Judge Geske; D.A. Vinopal appeared for D.A. Stoiber. Case is scheduled before Judge Geske for Final Pretrial on March 20, 1992 and Jury Trial on March 23, 1992, (A 136).

03-20-92 Guilty Plea entered before Judge Geske; D.A. Stoiber for state, (A 139-148).

04-07-93 Letter from defense attorney Huppertz confirming that ***Judge Geske agreed "to have the Armed Robbery charges consolidated into her court for the entry of a plea and sentencing."*** (A 122).

05-21-92 Sentencing by Judge Geske: 6 years *concurrent with sentences imposed in counts 1 & 2 if F-92-0368 (Armed Robbery case) 118 days credit*, (A 149-.172).

The district attorneys are noted for each appearance as the government commented that different district attorneys represented the state in the two cases. No case holds that this is evidence of consolidation.

The cases do comment that one defense attorney for both cases is evidence of consolidation, see *U.S. v. Russell*, 2 F.3d 200, 203 (7th Cir. 1993), citing the facts in *U.S. v. Garcia*, 962 F.2d 479, 483 (5th Cir.), *cert. denied*, ____ U.S. ____, 113 S.Ct. 293, 121 L.Ed.2d 217 (1992). Defense attorney Huppertz or his office represented Buford at all stages of each of the above cases, (A 110-172).

Buford's trial attorney Matthew Huppertz wrote Judge Geske's clerk on April 7, 1992 confirming that she agreed that the robbery case would be "consolidated into her [Judge Geske's] court for the entry of a plea and sentencing", (A 122). The Huppertz letter therefore shows that Judge Geske ordered that the robbery case was to be consolidated with the drug case in her court for both entry of a plea and for sentencing, (A 122).[4] The April 20 transcript of the plea hearing in the armed robbery case shows an agreement to use the same presentence report ordered in the drug case, (4-20-92 transcript: page 3, lines 5-7, A 125). Defense counsel's preliminary remarks, wherein he recites the negotiations, show an agreed date of May 21, 1992 was to be used as the sentencing date for both cases, (4-20-92 transcript: page 3, lines 3-5, A 125). The state then made a record of the fact that the February 17, 1992 Huppertz letter already recited that the two cases were consolidated, i.e. the state adopted the Huppertz letter as being a correct recitation of the matters recited in said letter, (4-20-92 transcript: page 3, lines 15-18, A 125). Buford is then asked by the Court if she agrees with the statements of counsel. Buford did agree with said statements, thereby evidencing

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4 Apparently, as stated above, Judge DiMotto took the April 20, 1992 Plea Hearing in the robbery case to accommodate Judge Geske, as the docket sheet shows Judge Geske presided at the Plea Hearing, (A

her reliance upon same, (4-20-92 transcript: page 3, lines 19-22, A 125). Judge DiMotto then accepted the plea, stated that he approved the negotiations (4-20-92 transcript: page 7, lines 7-9, A 129), and adjourned the case for sentencing before Judge Geske, with "This sentencing to be in conjunction with the sentencing on the other case you have in Judge Geske's Court." (4-20-92 transcript: page 7, lines 11-13, A 129).[5]

At sentencing A.D.A. Stoiber explained that the cases were charged separately only because Milwaukee County had a drug court, (5-21-92 transcript: page 5, lines 10-11; A 153). Apparently nothing regarding Milwaukee County's drug court rules prohibited the cases from being consolidated for plea or sentencing. Thus the cases were only separated for charging due to the organizational quirk of Milwaukee County having a separate drug court, but the cases were then consolidated and treated as one for entry of Buford's guilty pleas and for her sentencing.

Judge Geske found the two cases to be related as she commented that the drug dealing and the armed robberies were all motivated by Buford's drug addiction, (5-21-92 transcript: page 12, lines 3-14; A 160), (which motivation is also evidence of Buford's common scheme or plan in committing the armed robberies and the drug case). Judge Geske sentenced Buford on the armed robbery cases to 12 years on counts 1 and 2, with probation on counts 4 and 5, (5-21-92 transcript: page 19, line 17 – page 20, line 23; A 167). Judge Geske then sentenced Buford to 6 years on the drug case, with said sentence to be consecutive to the 12 year sentences on counts 1 and 2 of the armed robbery case, (5-21-92 transcript: page 20, line 24 – page 21, line 11; A 168).

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119), but the Plea Hearing transcript shows Judge DiMotto presided, (A 123).

5 Note, as stated above, that the armed robbery case had already been assigned to Judge Geske's court, as memorialized by the Huppertz letter, (A 122). Judge DiMotto appears to have been covering for Judge Geske.

The docket sheets in each show she was arrested on January 23, 1992, (A 117 & 135). Each complaint was dated January 27, 1992, (A 112 & 132).

In summary, the Huppertz letter (A 122) shows the robbery case was transferred to Judge Geske for consolidation with the drug case. The armed robbery docket sheet shows that Buford plead guilty (to counts one, two, four and five) in Judge Geske's branch[6] on April 20, 1992; and that Judge Geske sentenced Buford on May 21, 1992, (A 117-121). Said sentence being 12 years concurrent on counts one and two, with 15 years concurrent probation on counts four and five.[7]

The drug case docket sheet shows it was initially assigned to Judge Geske; that Buford plead guilty before Judge Geske on March 20, 1992; and that she was sentenced by Judge Geske on May 21, 1992, (A 135-138). Said sentence being "6 years in prison concurrent with sentences imposed in counts 1 & 2 in F 920368," ***[i.e. concurrent to the robbery case]***.

Buford did plead guilty on two different days, but both pleas were entered in Judge Geske's branch, and ***she was sentenced by Judge Geske in both cases to concurrent sentences on the same day***.

The above chronology shows the two cases were consolidated in Judge Geske's court.

The court of appeals agreed the case could come out either way if a *de novo* standard of review is used, *U.S. v. Buford*, 201 F.3d 937, 940 (7th Cir. 2000).

REASONS FOR GRANTING THE PETITION

The seventh circuit opinion shows there is a six to four split between the circuits regarding the standard of review of the "relatedness" decisions, *Buford, Id.* at 942. The effect on the defendants across the country is easily observed my Buford's enormous increase in sentence under

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6 Transcript of Plea Hearing shows plea was taken by Judge John DiMotto, (A 123). As stated above, he apparently was covering for her branch in Judge Geske's absence.

the Career Offender provision of the Sentencing Guidelines. She would have a sentencing range of 84-105 months without the Career Offender enhancement, but 188-235 months with the Career Offender enhancement, (see PSI page 31, ¶142).

The seventh circuit admitted that elements of Buford's situation support either conclusion that the cases were related, or that they were not related, and that "if our role is to make a *de novo* decision, then this appeal could come out either way", *Buford, Id.* at 940. The *Buford* court then elected to adopt the minority "deferential" standard for the seventh circuit, *Id.* at 942.

Wisconsin provided for a separate drug court, and therefore severed the drug count from the robbery counts. Other states may have similar quirks. The Career Offender designation carries an awesome increase in a federal sentence. The federal courts must use a *de novo* standard of review so that the federal sentences being imposed have uniformity, and are not subject to the variations of the different legislatures and courts of the states.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully Submitted,
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Dated: April 10, 2000

7 Buford's probation was revoked on counts four and five. (See PSI, paragraph 81).

In the
United States Court of Appeals
For the Seventh Circuit

No. 99-1834

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PAULA L. BUFORD,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 98-CR-210—**J.P. Stadtmueller**, *Chief Judge.*

ARGUED NOVEMBER 17, 1999—DECIDED JANUARY 12, 2000

Before ESCHBACH, EASTERBROOK, and ROVNER, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Following her plea of guilty to armed bank robbery, see 18 U.S.C. §2113(a) and (d), Paula Buford was sentenced to 188 months' imprisonment. The judge calculated an offense level of 31 (including all adjustments) after finding that she is a career offender. This led to a sentencing range of 188 to 235 months' imprisonment. If she is not a career offender, then her sentencing range is only 84 to 105 months.

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction, (2) the instant offense of conviction is a felony that is either a crime of violence or a con-

> trolled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. §4B1.1. Buford was 42 when she robbed the bank; armed bank robbery is a "crime of violence", see U.S.S.G. §4B1.2(a)(1), even though the object Buford described as a bomb would not have exploded; and she has more than 22 prior convictions. Details of many convictions are missing from the record, because state courts have destroyed relevant documents (most of the crimes are more than a decade old) and Buford has not turned over information in her own possession. But the district judge counted five more-recent convictions that meet the standard of §4B1.1. In 1992 Buford was convicted in a Wisconsin court of four armed robberies and possessing cocaine with intent to deliver it.

Five exceeds two, but this does not end the discussion, because a definitional provision in §4B1.2(c)(2) says that, when counting convictions for purposes of the career offender provision, the judge must determine that "at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c)." Turning back to §4A1.2(a)(2) we find: "Prior sentences imposed in unrelated cases are to be counted separately. Prior sentences imposed in related cases are to be treated as one sentence for purposes of §4A1.1(a), (b), and (c)." So when are cases "related"? Application Note 3 to §4A1.2 offers this advice:

> Prior sentences are not considered related if they were for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). Otherwise, prior sentences are considered related if they resulted from offenses that (A) occurred on the same occasion, (B) were part of a single common scheme or plan, or (C) were consolidated for trial or sentencing.

Buford's four armed robberies and one drug offense did not occur on the same occasion. See *United States v. Hudspeth*, 42 F.3d 1015 (7th Cir. 1994) (en banc) (defining "occasion" for purposes of 18 U.S.C. §924(e)(1), the Armed Career Criminal statute). Nor were they part of a common scheme or plan. The district court sensibly rejected Buford's argument that all crimes designed to raise revenue are related by that objective, which would treat a one-woman crime wave as having but a single countable offense and thus negate the principal function of the career offender guideline. Buford therefore relies on (C), asserting that the cases were consolidated for sentencing. As is frequently true, the details are messy and defy easy characterization—and the Sentencing Commission has not offered guidance on intermediate situations.

Buford was arrested in Milwaukee on January 23, 1992, after robbing a gas station at gunpoint. A search of her residence turned up a pistol, the loot, and 73 grams of cocaine. Buford confessed to three additional armed robberies of gas stations during 1990 and 1991. On January 27, 1992, state prosecutors filed two criminal complaints against Buford. The first charged her with committing five armed robberies. The second charged the drug offense and was assigned to a branch of the circuit court designated to handle drug prosecutions. Wis. Stat. §753.061(2). The cases were handled by different prosecutors and assigned to different judges. Buford pleaded guilty to four of the robberies and to the drug charge in separate hearings before the different judges. Sentencing in both prosecutions occurred on May 21, 1992, before the judge who had been assigned to the drug case. The record does not include an order of consolidation, though it does contain a letter from Buford's lawyer consenting to the procedure. The judge then imposed three sentences: 6 years for the drug offense; 12 years for two of the robberies; and 15 years for the other two robberies. These sentences ran concurrently. Two judgments (one for the robbery counts and one for the drug count) were entered. Wisconsin did

not follow a truth-in-sentencing approach back in 1992; the 15-year sentence was "withheld" (a form of probation), and the 12-year term of imprisonment ended in less than 6 years, allowing Buford to rob a bank in 1998. Her federal 188-month sentence, which amounts to 15 years and 8 months, will keep her in prison for much longer than her state "15-year" sentence. (Wisconsin adopted a true-sentence approach effective January 1, 2000, too late for Buford.)

Everyone agrees that the four armed robberies were consolidated with each other for trial and sentencing and thus count as but a single crime of violence for purposes of §4B1.1. Buford contends that the imposition of sentence by a single judge on a single occasion was a consolidation of the drug offense with the armed robberies for sentencing, within the meaning of Application Note 3. The federal prosecutor replies that there was no *consolidation*: there is no order of consolidation, and separate judgments were entered following the sentencing. We have held that joint sentencing for administrative convenience is not "consolidation for sentencing" under Application Note 3. *United States v. Bomski*, 125 F.3d 1115, 1119 (7th Cir. 1997); *United States v. Stalbaum*, 63 F.3d 537, 539 (7th Cir. 1995); *United States v. Russell*, 2 F.3d 200, 204 (7th Cir. 1993). But we have also held that a formal order of consolidation is unnecessary, and that cases may be deemed functionally consolidated when they are factually or logically related, and sentencing was joint. *United States v. Joseph*, 50 F.3d 401 (7th Cir. 1995). Here a single sentencing hearing, informed by a single presentence report, ended in concurrent sentences. Buford contends that her crimes were related through her addiction and would have been charged in a single indictment or information but for Wisconsin's decision to require drug prosecutions to be handled separately. This is not so clear; Wisconsin follows the approach of Fed. R. Crim. P. 8(a), see Wis. Stat. §971.12(1), and it might be hard to characterize the robberies and drug offense as "of the same or similar character or . . . based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Anyway, the separate drug court cuts both ways: the crimes *might* have been consolidated but for their assignment to separate branches, but the separation shows that Wisconsin does not want such prosecutions consolidated—and Application Note 3 defers to the state's practice on consolidation rather than creating an independent federal rule. (Wisconsin's provision for separation is not airtight; the branches designated under §753.061(2) are to handle drug cases "primarily" but not exclusively, which is why a single judge was able to sentence Buford for both the robberies and the drug offense. But the statute assuredly disfavors consolidation.)

Because elements of Buford's situation support either characterization, the standard of appellate review may be dispositive. If review is deferential, then affirmance follows straightaway, for the district court's conclusion that Buford's state cases were not functionally consolidated for sentencing cannot be called clearly erroneous. But if our role is to make a *de novo* decision, then this appeal could come out either way. What, then, is the right appellate posture? Until recently the court has treated this as an unresolved question. See *United States v. Carroll*, 110 F.3d 457, 460 (7th Cir. 1997); *United States v. Woods*, 976 F.2d 1096, 1099 (7th Cir. 1992); *United States v. Connor*, 950 F.2d 1267, 1270 (7th Cir. 1991); *Joseph*, 50 F.3d at 404; *Russell*, 2 F.3d at 204. Within the last few months two panels have taken a firm stance—but unfortunately the panels do not agree with each other, and the more recent panel did not acknowledge the prior, contrary decision. Compare *United States v. Joy*, 192 F.3d 761, 770 (7th Cir. 1999) (relatedness is a factual issue reviewed only for clear error), with *United States v. Jackson*, 189 F.3d 655, 658 (7th Cir. 1999) (all questions about application of the career offender guideline are reviewed *de novo*). Neither *Joy* nor *Jackson* gives a reason for its

conclusion or evinces awareness that the issue had been reserved by earlier panels. Divergence within the circuit mirrors a conflict among the circuits. Six review "relatedness" issues deferentially, while three engage in *de novo* decisionmaking. See *United States v. Correa*, 114 F.3d 314, 317 (1st Cir. 1997) (*de novo*); *United States v. Mapp*, 170 F.3d 328, 338 (2d Cir. 1999) (deferential); *United States v. Huggins*, 191 F.3d 532, 539 (4th Cir. 1999) (deferential); *United States v. Huskey*, 137 F.3d 283, 285 (5th Cir. 1998) (*de novo*); *United States v. Irons*, 1999 U.S. App. LEXIS 26887 at *9-10 (6th Cir. 1999) (deferential); *United States v. Bartolotta*, 153 F.3d 875, 879 (8th Cir. 1998) (deferential); *United States v. Allen*, 153 F.3d 1037, 1045 (9th Cir. 1998) (*de novo*); *United States v. Wiseman*, 172 F.3d 1196, 1219 (10th Cir. 1999) (deferential); *United States v. Mullens*, 65 F.3d 1560, 1565 (11th Cir. 1995) (deferential). By revisiting the subject, we can create at least intra-circuit harmony.

"Relatedness" and "consolidation" are not pure questions of law. No legal rule specifies what it means for cases to be "consolidated for sentencing." If in *Joseph* we had adopted the view that "consolidation" is a matter of form—cases are consolidated if there is an order of consolidation, otherwise not—then it would make sense to engage in *de novo* consideration. A record either contains an order of consolidation or it doesn't, which dictates a legal outcome—though if the existence of the order were debatable, the district judge's resolution of that wholly factual issue would be reviewed deferentially. But once *Joseph* adopted a functional approach to consolidation, it became impossible to say that one characterization rather than another is mandatory. We have instead a classic mixed issue, where the court must apply legal norms to classify the facts. And disputes about the proper characterization of events, when legal norms guide rather than determine the answer, are principally committed to district courts, with deferential appellate review. Thus even though a finding of racial discrimination requires the application of law to facts, the existence of discrimination is itself a "fact" and review is for clear error only. *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982). Whether an employee is a "seaman" under a multi-factor balancing approach likewise is a question of fact, with deferential appellate review. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986). Even the question whether a complaint is "frivolous" for purposes of Fed. R. Civ. P. 11—a subject that requires no fact-finding by the district court—is reviewed deferentially. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401-05 (1990).

Cooter & Gell holds that when the legal inquiry resists statement as a rule of general applicability, and when the application of that rule is a case-specific determination, courts of appeals should treat the district judges' conclusions deferentially. Our own cases likewise emphasize that matters of characterization and application, which lack general significance to other litigants, are best resolved by the district court, with a light appellate touch. See, e.g., *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928 (7th Cir. 1989) (en banc); *Morton Community Unit School District No. 709 v. J.M.*, 152 F.3d 583 (7th Cir. 1998); *Mucha v. King*, 792 F.2d 602, 604-06 (7th Cir. 1986); *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1428-29 (7th Cir. 1985). As the second circuit put the point in *Mapp*, 170 F.3d at 338 n.15, deferential review is appropriate "[b]ecause of the (obviously) fact-intensive nature of the inquiry and because a sentencing court's findings regarding factual relatedness in any given case are unlikely to establish widely-applicable principles of law". (None of the three circuits that has gone the other way has offered a reasoned explanation for the choice, and the fifth circuit in *United States v. Garcia*, 962 F.2d 479, 481 (5th Cir. 1992), explained that although the argument for deferential review is "compelling," the circuit would continue to use *de novo* review because of unexplained prior decisions.)

How best to understand the events in the Wisconsin courts in spring 1992 has no significance beyond these

parties. Someone has to select a characterization of complex facts, and the best candidate for that role is the district judge. Questions concerning application of the Guidelines generally are reviewed deferentially, see *Koon v. United States*, 518 U.S. 81, 96-100 (1996), unless the district court makes an identifiable legal mistake; that principle is as applicable to "relatedness" as it was to the questions under review in *Koon*. We hold accordingly that whether cases have been "consolidated" for trial or sentencing is a matter of fact, to be reviewed deferentially by the court of appeals. Other issues in the application of the career-criminal guideline may be strictly matters of law with general application, and for those issues review would be plenary. Because this conclusion resolves a conflict among panels of this court, it was circulated to all active judges under Circuit Rule 40(e). None of the judges favored a hearing en banc.

The district judge did not commit a clear error in finding that the joint sentencing was a matter of administrative convenience rather than a "consolidation for sentencing." Separate sentences were imposed and separate judgments entered. Treating Buford as a career offender makes a good deal of sense; her lengthy record demonstrates that she is an incorrigible criminal who regularly uses weapons (or, in her latest robbery, the threat of a bomb). With a record of convictions past two dozen, she is a "career" offender.

AFFIRMED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA-97-C-006—Midwest Law Printing Co., Inc., Chicago—1-12-00

THE COURT: All right. Mr. Kagen, do you take issue with Mr. Robles' comment?

MR. ROBLES: I do have a copy of the show-up.

MR. KAGEN: To speed things up, I was not her counsel back then. I just asked her because I wouldn't have any way of knowing if the factual statement Mr. Robles made was correct. My client does acknowledge that it was correct.

THE COURT: All right. In the vernacular, to cut to the chase here, I think the only factual issue that drives whether or not these cases were consolidated or not is the extent to which a record was made or perhaps, better stated, was not made before the Milwaukee County Circuit Court on the day of sentencing. It is quite obvious that the guilty pleas that were entered in these two cases numbered 368 and 369 were done on separate days before separate judges, and we only get to the matter of consolidation in terms of Judge Geske imposing sentence on May 21st of 1992. And relating those salient facts, it is clear that there was no agreement between the state and Ms. Buford and her counsel with regard to the consolidation of these cases, either for purposes of charging or for purposes of disposition. And, clearly, there was no agreement, beyond counsel now arguing by inference that there was a consolidation, that, in fact, consolidation was an integral part of the sentencing proceeding on May 21st of 1992.

And so to the extent that either the government or you, Mr.

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Kagen, have any additional argument you want to make, the court is simply left to draw from the record that was made before the Milwaukee County Circuit Court in May of 1992 as to whether or not these two cases were in fact consolidated, as that term is used in the context of the federal sentencing guidelines. One of the things that federal judges are not about to get involved in is revisionist history with respect to what may or may not have occurred before another court on another day in another jurisdiction. And so I am simply left to apply as best I can the provisions of the sentencing guidelines together with the applicable application notes to the relevant facts here, but to the extent that there is an inference of consolidation, I am left to conclude that the only inference of consolidation is the fact that sentences were imposed in two different cases on the same date before the same judge, with no formal consolidation order. And when I say formal, I'm referring to something of record, either before a court reporter or a written document.

And, of course, the other fact that tends to undermine your current suggestion that these cases were in fact consolidated was the fact that two different assistant district attorneys appeared at the sentencing hearing with respect to each of their respective cases. And while that in the final analysis certainly is not controlling, it certainly goes a long way to suggest that, for many reasons that are left to the executive

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branch of government, including state government, the matter of whether or not cases ought to be consolidated or charges read in or diverted is left to the discretion of the prosecutor. But I'm certainly willing to give you an opportunity to argue as you have in written form, Mr. Kagen, that your client does not meet the federal test for considering these offenses and sentences separately in light of the federal sentencing guidelines that she now is confronted with.

MR. KAGEN: I assume you don't want me to repeat what I've had filed here. I tried to get all the records I could, the transcripts from the state proceedings. And, again, I stand by what I filed. I think the Seventh Circuit's cases fall apart on scrutiny, simple scrutiny, and I think that the Ninth Circuit cases are quite clear that there is a trend towards considering functional consolidation. And as I said earlier, even today, there was tremendous angst in the Seventh Circuit about the effect of this, but there were some recent amendments that I've set forth in the written documents showing that there appears to be a compelling change in the application notes and that the safety valve is to upwardly depart. So, again, I don't want to rehash everything I've filed. Obviously the court's studied it carefully.

THE COURT: Well, I guess by way of response, Mr. Kagen, I don't know which particular cases you have in mind that lead you to conclude that the Seventh Circuit somehow is

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changing its attitude or policy in these situations to allow your client to have these two sentences considered consolidated. I may be missing something here, but based on the record that has been made factually, I don't even think this is a close case, to be quite candid. Now, if you've got something to suggest or if I have misread some of your submittal, I'll be happy to take the time to walk through it again this morning, but I'm reading in considerable detail, particularly the March 26th, the second addenda, in which you come back and challenge the probation department.

I'm interested in knowing what further rejoinder you have to the probation officer's response addressed on page four and five of the addenda, because I think Ms. Morgan has laid it out pretty cold, not to be trite, that these cases were not consolidated and ought not be considered by this court as consolidated for purposes of applying the otherwise applicable sentencing guidelines that drive the career offender status that is at bottom in this sentencing proceeding.

MR. KAGEN: My March 19th response did address the Stalbaum case, and I thought the government had taken that out of context. I think also, looking at what was cited by way of Wisconsin cases in Stalbaum, we see that they go back to 1800 statutes that really have no application here. And, again, I've set that forth in my submissions. I just don't think that the Seventh Circuit cases are well grounded in current law. I

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think, as a practical sense, what's happening is the functional consolidation issue that the Ninth Circuit is following and --

THE COURT: Well, regrettably the Ninth Circuit is not the Seventh Circuit, and when you go to the Ninth Circuit, regrettably, there is very little in the way of legal propositions that along the way you can't find some authority for and, as a consequence, in the view of this humble judge, there's not an awful lot of solace in particular cases from the Ninth Circuit because they're literally all over the map. And, more importantly, when the Seventh Circuit has spoken on the issue, there's no reason to go to another circuit with respect to the court's analysis.

And it may well be that this unique set of facts -- although I don't think they're very unique in the final analysis -- may cause my colleagues on the Seventh Circuit to take another view of all of this. And while I may be tipping my hand a bit here, I am unpersuaded on the state of the record that has been made, looking at all of the facts that are recited chapter and verse, both in the original presentence and then addressed twice over in these two addenda, that leads this court to conclude that, insofar as the operation of the federal sentencing guidelines, that these two state court cases were consolidated. Drugs and bank robberies may on occasion have common ground but in this instance they clearly did not.

And, again, this court is without any record to suggest

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that the two prosecutors, Mr. Simpson and Mr. Stoiber, in the district attorney's office didn't have separate interests here. There were separate victims in the bank robberies. The drugs were, other than the temporal relationship, unrelated. It wasn't as if she was charged with possession of drugs and robbery of someone to have obtained the drugs that she was charged with possessing. And it's a matter of having made or not having made an appropriate record. And all we, as federal judges, can do is put full faith and credit in the judgments and convictions that underlie and drive the defendant's criminal history score and apply the guidelines as best we can. But from the record that was made here, I am unwilling and unable, applying the relevant guidelines and the relevant case authority, to agree with Ms. Buford's position that these cases were consolidated and, therefore, the career offender provisions not be triggered and then somehow come back and depart from the guidelines in another fashion. I don't find on the record that that is at all appropriate.

And, fortunately, in this case, unlike several others that this court has recently had experience with, at least the government had the presence of mind to draw to Ms. Buford's attention before she pled guilty to this bank robbery that it was their view that she did qualify for career criminal offender status. So we are not dealing with a situation, as I have recently had to deal with others in your office, Mr.

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Robles, where it appeared to the court that not only was the defendant and his attorney not aware of the implications of the career offender provisions but the assistant U.S. attorney, regrettably, never said anything. And I think it may have been because she was, although aware of career criminal offender, was not aware of the profound implications under the sentencing guidelines. So at least we don't have that debacle to confront with in Ms. Buford's case.

So to the extent that the facts are presented here, I am constrained to conclude that the two cases that I referenced earlier, that is, F-920368 and F-920369, were not consolidated as related cases for U.S. Sentencing Guideline purposes.

Are there any other factual matters, Mr. Kagen, that you or your client wish to have the court address?

MR. KAGEN: Nothing other than what was in the submissions, no, Judge.

THE COURT: Thank you.

Mr. Robles, Mr. Larsen, do either of you have any objection as to any of the facts presented by Ms. Morgan in her presentence and the addenda?

MR. ROBLES: No, I do not.

THE COURT: That being the case, the court first adopts all of the facts that have been presented in the presentence report, concluding, as I have already put on the record, that the facts presented do not disclose a

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consolidation of the two -- of the underlying circuit court cases that would preclude the court applying the career offender provisions of the sentencing guidelines to Ms. Buford's criminal history score, triggering an enhancement in her offense level. And I will rely on those facts first in determining the ultimate sentencing guidelines that apply here, together with the ultimate sentence of the court.

Now, in recognition of the court's findings as to the facts, the probation department recommends the following guidelines as being applicable in this case. They include a total offense level of 31, a criminal history score of Roman numeral VI, a guideline term of imprisonment of 188 to 235 months, followed by at least three but not more than five years of supervised release, a fine of not less than $15,000, nor no more than $150,000, and, finally, a $100 special assessment.

Having made those findings and knowing how the court addressed the matter of the consolidation issue on the two state court cases, Mr. Kagen, do you and your client otherwise accept the guidelines as the probation department has recommended them?

MR. KAGEN: Yes.

THE COURT: Thank you.

Mr. Robles, do you and Mr. Larsen similarly accept the sentencing guidelines as recommended by the probation department?

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MR. ROBLES: Yes, we do, subject to our recommendation which is made in the plea agreement that I'll expound on.

THE COURT: All right. Thank you. That being the case and the court having no independent basis to take exception to or otherwise disagree with the guidelines as recommended, given my ruling on the underlying facts with regard to the relatedness issue of these two circuit court cases, I do herewith adopt each of the sentencing guidelines as recommended. Again, they include a total offense level of 31, a criminal history score of Roman numeral V -- or VI, a guideline term of imprisonment of 188 to 235 months, followed by at least three but not more than five years of supervised release, a fine of not less than $15,000, nor no more than $150,000, finally, a $100 special assessment.

Having made those findings, Mr. Kagen, do you know of any reason why the court ought not proceed this morning with the imposition of sentence in your client's case; and, if not, is there any statement that you or Ms. Buford would like to make in mitigation?

MR. KAGEN: We have no objection to the proceedings continuing and being completed today.

THE COURT: All right. And knowing that, is there any statement that you would like to make to the court and does your client wish to address the court?

MR. KAGEN: Yes.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA

v.

PAULA LOUISE BUFORD
a/k/a "Paula L. Bufford"

JUDGMENT IN A CRIMINAL CASE

Case Number: 98-CR-210-001

Robert A. Kagen
Defendant's Attorney

David Robles
Special Assistant United States Attorney

U.S. DIST. COURT EAST DIST. WISC.
FILED
APR 2 1999
AT ___ O'CLOCK ___ M
SOFRON B. NEDILSKY

THE DEFENDANT:

pleaded guilty to Count One of the indictment.

Title & Section	Nature of Offense	Date Concluded	Count(s)
18 U.S.C. § 2113(a) & (d)	Armed Bank Robbery	3/18/98	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Date Sentence Imposed:
April 2, 1999

J. P. Stadtmueller
Chief Judge

Defendant's Soc. Sec. No.: 336-48-7337

Defendant's Date of Birth: 8/10/55

Defendant's USM No.: 05422-089

Defendant's Legal Address:
9510 West Fond du Lac Avenue
Apartment 22
Milwaukee, WI 53225

April 2, 1999
Date Judgment Signed

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Defendant: Paula L. Bu...d
Case Numbers: 98-CR-210

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of one hundred eighty-eight (188) months as to Count One of the indictment.

The defendant is remanded to the custody of the United States Marshal.

The court makes the following recommendation to the Bureau of Prisons:

(1) that the defendant be evaluated for her participation in a drug treatment and counseling program; and

(2) that the defendant be incarcerated at FCI – Pekin, IL.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____
_____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy U. S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a total term of five (5) years as to Count One of the indictment.

The defendant shall not commit another federal, state, or local crime and shall comply with the following special conditions:

1. The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

2. The defendant shall not possess a firearm as defined in 18 U.S.C. § 921 or any other dangerous weapon.

3. Pursuant to the Violent Crime Control and Law Enforcement Act of 1994, the defendant shall not illegally possess any controlled substance. Such possession will result in revocation of the supervised release term and the defendant will be obligated to serve a further term in prison.

4. The defendant shall participate in a program of testing and residential or outpatient treatment for drug and alcohol abuse, as directed by her supervising probation officer, until such time as the defendant is released from such program. The defendant is to refrain from the use of all alcoholic beverages throughout the period of her supervised release term.

5. After release from imprisonment, the defendant is to reside for the first 90 days in a community correctional center upon the first available vacancy. The defendant is to obey the rules of that facility.

6. The defendant shall participate in a mental health treatment program and shall take any and all prescribed medications as directed by the treatment provider and participate in any psychological/psychiatric evaluation and counseling as may be directed by her supervising probation officer.

7. The defendant shall pay any balance of the restitution at a rate of no less than $50.00 per month.

8. The defendant is to provide access to all of the financial information required by her supervising probation officer.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or his or her supervising probation officer.

2. The defendant shall report to his or her supervising probation officer and shall submit a truthful and complete written report within the first five days of each month.

3. The defendant shall answer truthfully all inquiries by his or her supervising probation officer and follow the instructions of his or her supervising probation officer.

4. The defendant shall support his or her dependents and meet other family responsibilities.

5. The defendant shall work regularly at a lawful occupation unless excused by his or her supervising probation officer for schooling, training, or other acceptable reasons.

6. The defendant shall notify his or her supervising probation officer ten days prior to any change in residence or employment.

7. The defendant shall refrain from excessive use of alcohol.

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by his or her supervising probation officer.

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of his or her supervising probation officer.

11. The defendant shall notify his or her supervising probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13. As directed by his or her supervising probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit his or her supervising probation officer to make such notification and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5 Part B.

	Assessment	Fine	Restitution
Totals:	$100.00	$0	$2,615.00

FINE

Based on the defendant's limited finances the court determines that the defendant does not have the financial ability to pay a fine, costs of incarceration, costs of community confinement or supervision and therefore waives the fine, costs of incarceration, costs of community confinement and cost of supervision in this case.

A waiver of the cost of community confinement does not preclude the Bureau of Prisons from imposing a subsistence fee of up to 25 percent of gross income, based on ability to pay, for any portion of the sentence spent in a community correctional facility.

RESTITUTION

The defendant shall pay restitution to the following payee in the amount listed below. The court waives interest on the restitution.

Name of Payee	**Total Amount of Loss	Restitution Ordered
State Financial Bank ATTN: Ron Knaus Assistant Vice President 2650 North Downer Avenue Milwaukee, WI 53211	$2,615.00	$2,615.00
Totals:	$2,615.00	$2,615.00

** Findings for the total amount of losses are required under Title 18 of the United States Code, Chapters 109A, 110, 110A and 113A

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution.

Special instructions regarding the payment of criminal monetary penalties:

The $100.00 special assessment is due and payable immediately to the Clerk of Court's office, Room 362, U.S. Courthouse.

The court considers the defendant's participation in the Federal Bureau of Prisons Inmate Financial Responsibility Program a necessary part of the repayment of the court-imposed financial obligations. Payments are to apply first to the special assessment and then to the restitution until paid in full.

During any period of supervised release, the defendant shall pay any balance of the restitution at a rate of no less than $50.00 per month.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All Criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, his or her supervising probation officer, or the United States Attorney.

Defendant: Paula L. Buford
Case Numbers: 98-CR-210

STATEMENT OF REASONS

The court adopts the factual findings and guideline application contained in the 1/27/99 presentence report as updated and modified by the 2/23/99 and 3/26/99 addenda to that report. Furthermore, the court determines that the Milwaukee County Court did not consolidate the defendant's cases (numbers F-920368 and F-920369) for purposes of the 5/21/92 sentencing and that therefore they constitute two separate offenses.

Guideline Range Determined by the Court:

Total Offense Level: 31

Criminal History Category: VI

Imprisonment Range: 188 to 235 months

Supervised Release Range: 3 to 5 years

Fine Range: $15,000.00 to $150,000.00 (with costs of imprisonment/ supervision)

Fine waived because of inability to pay.

Restitution: $2,615.00

$100.00 special assessment

This sentence is within the guidelines range, that range exceeds 24 months, and the sentence is imposed for the following reason:

(1) because of the seriousness and risk of harm of the defendant's offense in combination with her prodigious criminal history.

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RESPONSE REQUESTED
GRANTED

ORIGINAL

No. 99-9073

Supreme Court, U.S.
FILED
JUN 22 2000
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

PAULA L. BUFORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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RECEIVED
SUPREME COURT U.S.

QUESTION PRESENTED

Whether a district court's determination that a defendant's prior convictions are not "related," for purposes of the career offender provision of the Sentencing Guidelines, is subject to a deferential standard of review.

IN THE SUPREME COURT OF THE UNITED STATES

No. 99-9073

PAULA L. BUFORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 201 F.3d 937.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2000. The petition for a writ of certiorari was filed on April 10, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a plea of guilty in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d). The district court sentenced petitioner as a career offender to 188

months' imprisonment to be followed by five years' supervised release. The court of appeals affirmed. Pet. App. A1-A8.

1. a. On January 23, 1992, petitioner entered Jack's Mobil Service Station in Milwaukee, Wisconsin. She produced a handgun, pointed it at an employee, and demanded money. The employee handed over $450 in cash. Petitioner fled in a Buick Skylark. Police officers traced the Skylark to petitioner, who was stopped while driving the car later that day. See Pet. App. A3; Gov't C.A. Br. 5.

At petitioner's residence, the police officers found 25 packages of cocaine, with a total weight of 73.44 grams, and a .32 caliber semiautomatic pistol. Petitioner admitted that the cocaine was hers and that she sold about 12 ounces of cocaine a week. In response to further police questioning, petitioner admitted to committing not only the Jack's Mobile Service Station robbery, but also three other armed robberies of Milwaukee service stations in 1990 and 1991. See Pet. App. A3; Gov't C.A. Br. 5-6.

b. On January 27, 1992, Wisconsin prosecutors filed two criminal complaints against petitioner in Milwaukee County Circuit Court. The first complaint, in Case No. F-920368, charged petitioner with five armed robberies, including the four to which she had admitted. The second complaint, in Case No. F-920369, charged petitioner with possessing a controlled substance, cocaine, with the intent to deliver it. The armed robbery case was assigned to Judge Wedemeyer in Court Branch 34; the drug case was assigned to Judge Geske in Court Branch 23. The two cases were prosecuted

by different assistant district attorneys. See Pet. App. A3; Gov't C.A. Br. 6-7.

On March 20, 1992, petitioner entered a guilty plea to the drug charge. Judge Geske set a sentencing date of May 21, 1992. See Gov't C.A. Br. 6-7.

On April 20, 1992, petitioner entered a guilty plea to four of the five armed robbery charges. Judge DiMotto, who presided at the guilty plea proceeding, scheduled the sentencing for May 21, 1992, observing that "[t]he sentencing is to be in conjunction with the sentencing in the other case." No order consolidating the drug case with the armed robbery case was ever entered. See Gov't C.A. Br. 7.

At petitioner's sentencing, one assistant district attorney presented the State's position in the armed robbery case, while another assistant district attorney presented the State's position in the drug case. Judge Geske sentenced petitioner to six years' imprisonment for the drug offense, 12 years' imprisonment for two of the armed robberies, and 15 years' imprisonment for the other two armed robberies, all terms to run concurrently. The court entered two judgments, one in the armed robbery case and one in the drug case. See Pet. App. A3-A4; Gov't C.A. Br. 7.

2. a. On March 18, 1998, petitioner entered the State Financial Bank in Milwaukee. She approached a teller window, placed a bag on the counter, and presented the teller with a note that read: "Please be calm and no one will be hurt. There is a bomb in the bag set to go off in five minutes. Put loose bills in

paper bag. Count to fifteen before calling bomb unit. I will kill us all if necessary." The teller turned over $2,615 to petitioner, who then fled the bank. See Gov't C.A. Br. 4.[1]

On November 3, 1998, a federal grand jury indicted petitioner on one count of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d). On December 14, 1998, petitioner entered a guilty plea to the charge. See Gov't C.A. Br. 4.

b. The Presentence Report (PSR) prepared by the Probation Office classified petitioner as a career offender under the Sentencing Guidelines. A defendant is a career offender, and thus is subject to an enhanced sentence, if "(1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." Guidelines § 4B1.1. In order to satisfy the third prong of the definition, a defendant must have at least two prior felony convictions, "counted separately." Id. § 4B1.2(c)(2). The Guidelines state that "[p]rior sentences imposed in unrelated cases are to be counted separately," whereas "[p]rior sentences imposed in related cases are to be treated as one sentence." Id. § 4A1.2(a)(2). Application Note 3 to Guidelines § 4A1.2 offers further guidance on

[1] The bag did not, in fact, contain a bomb. See Gov't C.A. Br. 4.

when sentences are to be treated separately:

> Prior sentences are not considered related if they were for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). Otherwise, prior sentences are considered related if they resulted from offenses that (A) occurred on the same occasion, (B) were part of a single common scheme or plan, or (C) were consolidated for trial or sentencing.

The PSR counted petitioner's 1992 drug conviction as separate from her 1992 armed robbery convictions.[2] As a career offender, petitioner was subject to a Guidelines sentencing range of 188 months' to 235 months' imprisonment, as opposed to 84 months' to 105 months' imprisonment. Pet. App. A1.

Petitioner challenged the PSR on the ground that she was not properly classified as a career offender. She argued that her state drug and armed robbery convictions were related under the Guidelines because the cases had been consolidated for sentencing.

The district court rejected petitioner's challenge. Pet. App. B7-B8. The court noted that there was no formal order consolidating the cases or any agreement between the State and petitioner with respect to consolidation. Id. at B1-B2. The court concluded that the drug and armed robbery cases were not "function[ally] consolidat[ed]," as petitioner contended, simply because the same judge sentenced petitioner on the same day in both cases. Id. at B5. The court noted that petitioner entered guilty

[2] Although, as the court of appeals noted (Pet. App. 2A), petitioner "has more than 22 prior convictions," only the 1992 convictions were considered in determining her career criminal status. The four armed robberies of which petitioner was convicted in 1992 were treated as related offenses. Id. at A4.

pleas in the two cases on different days before different judges and that different assistant district attorneys represented the State in the two cases, including the sentencing proceedings. Id. at B1, B2. The court found that the drug offense was not factually related to the armed robbery offenses -- e.g., "[i]t wasn't as if she was charged with possession of drugs and robbery of someone to have obtained the drugs" -- and that the State had distinct interests in the two cases. Id. at B5-B6. Accordingly, the court concluded that the drug and armed robbery convictions were not related within the meaning of Section 4A1.2 of the Sentencing Guidelines, and thus that petitioner qualified for sentencing as a career offender. Id. at B7-B8.

3. The court of appeals affirmed. Pet. App. A1-A8.

The court of appeals held that a district court's ruling on whether a defendant's prior convictions are related, for purposes of the Section 4A1.2 of the Sentencing Guidelines, is subject to deferential, rather than de novo, appellate review. Pet. App. A7-A8. The court observed that, under circuit precedent, "[r]elatedness" and "consolidation" are not mere matters of form; rather, two criminal cases may be treated as having been functionally consolidated, without any formal order of consolidation, "when they are factually or logically related, and sentencing was joint." Id. at A4, A6. In view of that precedent, the court characterized the issue whether two cases are related as "a classic mixed issue where the court must apply legal norms to classify the facts." Id. at A6. The court noted that such mixed

issues of law and fact "are principally committed to district courts, with deferential appellate review." Ibid. The court reasoned that such a standard is appropriate with respect to the particular issue here "[b]ecause of the (obviously) fact-intensive nature of the inquiry and because a sentencing court's findings regarding factual relatedness in any given case are unlikely to establish widely applicable principles of law." Id. at A7 (quoting United States v. Mapp, 170 F.3d 328, 338 n.15 (2d Cir.), cert. denied, 120 S. Ct. 239 (1999)). The court noted that most circuits that have considered the question -- and all that have offered "a reasoned explanation for the choice" -- have held that relatedness issues are subject to deferential review. Id. at A6 (citing cases), A7.

Applying that standard, the court of appeals held that the district court did not commit clear error in concluding that petitioner's drug conviction and armed robbery convictions were not related. Pet. App. A8. The court noted that "[s]eparate sentences were imposed and separate judgments entered" in the two cases. Ibid. The court also observed that "[t]reating [petitioner] as a career offender makes a good deal of sense," given "her lengthy record demonstrat[ing] that she is an incorrigible criminal who regularly uses weapons." Ibid. The court thus found it unnecessary to decide whether the district court's ruling would also have withstood de novo review. See id. at A5 (observing that "if our rule is to make a de novo decision, then this appeal could come out either way").

ARGUMENT

Petitioner contends (Pet. 12-13) that the court of appeals erred in holding that a district court's determination that criminal convictions are related, for purposes of Section 4A1.2 of the Sentencing Guidelines, is subject to deferential review, as opposed to de novo review. Contrary to petitioner's assertions, however, the court of appeals' holding is correct, is consistent with the decisions of this Court and the vast majority of the other circuits that have considered the issue, and does not warrant this Court's review.

1. Congress has provided that, in reviewing sentencing appeals, "[t]he court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts." 18 U.S.C. 3742(e). While pure legal questions under the Guidelines merit de novo review, see Koon v. United States, 518 U.S. 81, 100 (1996), as the court of appeals recognized (Pet. App. A6) and petitioner does not dispute, the question whether a defendant's prior convictions occurred in "related cases," within the meaning of Section 4A1.2(a)(2), is a "classic mixed question" of law and fact. This Court has explained that "deferential review of mixed questions of law and fact is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question or that probing appellate

scrutiny will not contribute to the clarity of legal doctrine." Salve Regina College v. Russell, 499 U.S. 225, 233 (1991) (quoting Miller v. Fenton, 474 U.S. 104, 114 (1985)); accord Koon, 518 U.S. at 99 (district courts' departures from the Guidelines are reviewed deferentially); Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 402-405 (1990) (district courts' determinations that a complaint is "frivolous" under Rule 11 of the Federal Rules of Civil Procedure are reviewed deferentially).

This case concerns such an issue. As the court of appeals explained, a district court's inquiry into whether two criminal cases are related is "obviously fact-intensive" and is "unlikely to establish widely-applicable principles of law." Pet. App. A7 (quoting United States v. Mapp, 170 F.3d 328, 338 n.15 (2d Cir.), cert. denied, 120 S. Ct. 239 (1999)) (internal parentheses omitted). That inquiry, like those in Koon and Cooter & Gell, typically involves "multifarious, fleeting, special, narrow facts that utterly resist generalization." Koon, 518 U.S. at 99. Here, for example, the district court scrutinized the records of petitioner's prosecutions in Milwaukee County Circuit Court in 1992 to ascertain whether the prosecutions had been formally consolidated or had been effectively consolidated by the acts of the presiding judges and the parties. As the court of appeals observed, "[h]ow best to understand the events in the Wisconsin courts in spring 1992 has no significance beyond these parties." Pet. App. A7-A8. In such circumstances, "de novo review is 'unlikely to establish clear guidelines for lower courts,'" Koon,

518 U.S. at 99 (quoting Cooter & Gell, 496 U.S. at 405), and thus is not a productive use of judicial resources.

2. Ten circuits have addressed the standard of review applicable to various aspects of district courts' rulings on whether convictions are related within the meaning of Guidelines Section 4A1.2. Seven of those circuits, including the Seventh Circuit in this case, have expressly adopted a deferential standard. See Mapp, 170 F.3d at 338; United States v. Huggins, 191 F.3d 532, 539 (4th Cir. 1999), cert. denied, No. 99-7896, 2000 WL 575156 (May 15, 2000); United States v. Irons, 196 F.3d 634, 638 (6th Cir. 1999); United States v. Bartolotta, 153 F.3d 875, 879 (8th Cir. 1998), cert. denied, 525 U.S. 1093 (1999); United States v. Wiseman, 172 F.3d 1196, 1219 (10th Cir.), cert. denied, 120 S. Ct. 211 (1999); United States v. Mullens, 65 F.3d 1560, 1565 (11th Cir. 1995), cert. denied, 517 U.S. 1112 (1996).[3]

The court of appeals stated that three other circuits review "'relatedness' issues" under a de novo standard. Pet. App. A6 (citing United States v. Correa, 114 F.3d 314, 317 (1st Cir.), cert. denied, 522 U.S. 927 (1997); United States v. Huskey, 137 F.3d 283, 285 (5th Cir. 1998); United States v. Allen, 153 F.3d 1037, 1045 (9th Cir. 1998), cert. denied, 525 U.S. 1170 (1999)).

In Correa, the court of appeals resolved a general question concerning whether convictions for factually unrelated offenses

[3] Petitioner mistakenly characterizes (Pet. 13) the decision below as adopting as "the minority 'deferential' standard." As the cases cited in the text demonstrate, the deferential standard is the predominant standard in the federal courts of appeals.

could ever be deemed to be related in the absence of a formal order of consolidation. After noting that review of sentencing determinations "ordinarily is deferential" except "to the extent that an alleged error involves the * * * interpretation of a sentencing guideline [which] presents a question of law warranting plenary review," the court held that charges based on offenses that are "temporally and factual distinct * * * should not be regarded as having been consolidated (and, therefore, 'related') unless the original sentencing court entered an actual order of consolidation or there is some other persuasive indicium of formal consolidation apparent on the face of the record." Correa, 114 F.3d at 317. That holding is consistent with the court of appeals' holding in this case. See Pet. App. A8 ("Questions concerning application of the Guidelines are reviewed deferentially * * * unless the district court makes an identifiable legal mistake.").

In Huskey, the court of appeals held that "offenses charged under the same docket number have been 'consolidated' even absent a formal order of consolidation." 137 F.3d at 286. The question in Huskey was thus more purely legal than the question in this case. The Huskey court did indicate that it believed that circuit precedent "impels a de novo review of relatedness determinations," id. at 286 n.3, but it did not specifically address the standard of review applicable to a district court's "obviously fact-intensive" inquiry whether, under the general legal rules articulated in Huskey and earlier cases, a particular defendant's prior convictions are related. Pet. App. A7 (quoting Mapp, 170 F.3d at

338 n.15 (parentheses omitted)).

In Allen, the Ninth Circuit stated generally that "[w]e review de novo whether two prior sentences are related under § 4A1.2," citing as authority its earlier decision in United States v. Chapnick, 963 F.2d 224, 226 (9th Cir. 1992). Allen, 153 F.3d at 1045. Chapnick also made clear, however, that "[a]ny findings of fact that underlie the district court's sentencing decision are reviewed for clear error." Chapnick, 963 F.2d at 226. And Allen itself recognized that, in determining whether cases are related under Guidelines Section 4A1.2, "the inquiry is fact specific." Allen, 153 F.3d at 1045. It is thus unclear whether the district court's fact-specific determination in this case -- that petitioner's drug conviction was not related to her armed robbery convictions -- would have been reviewed with significantly less deference by the Ninth Circuit than it was by the Seventh Circuit.

In sum, whatever differences arguably may exist in the circuits' articulation of the standard of review to be applied to district courts' rulings on whether a defendant's prior convictions are related under Guidelines Section 4A1.2, they are unlikely to produce differences in ultimate outcomes. If experience should prove otherwise, the Sentencing Commission is capable of addressing the situation through revisions of the Guidelines and the Application Notes, without the need for this Court's intervention. For example, the Sentencing Commission might provide that, absent a formal order of consolidation, two cases should not be treated as related for purposes of Section 4A1.2, thereby eliminating the need

to ascertain, as in this case, whether the cases were nonetheless functionally consolidated. See Pet. App. A6 (suggesting that such a rule might warrant a different standard of review). As this Court has observed, "in charging the Commission 'periodically [to] review and revise' the Guidelines, Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." Braxton v. United States, 500 U.S. 344, 348 (1991) (quoting 28 U.S.C. 994(o)).

3. In any event, even under a de novo standard of review, the district court did not err in concluding that petitioner's drug conviction was not related to her armed robbery convictions, within the meaning of Guidelines Section 4A1.2. The cases were never formally consolidated. In addition, each case had a different docket number, a different minute sheet, a different scheduled trial date, and a different guilty plea date. Each case was assigned to a different judge and a different assistant district attorney. Although the same judge conducted sentencing in the two cases on the same date, the assistant district attorneys made separate arguments at the sentencing relating to the drug offense and the armed robbery offenses. The sentencing judge imposed different, albeit concurrent, sentences in each case and entered separate judgments of conviction in each case. See Gov't C.A. Br. 12-14. On that record, the district court correctly ruled that petitioner had "two prior felony convictions of either a crime of

violence or a controlled substance offense." Guidelines § 4B1.1; see also Pet. App. B4 (district court observes that, "based on the record that has been made factually, I don't even think this is a close case, to be quite candid").

Accordingly, even if the Court were to conclude that the Seventh Circuit erred in applying a deferential standard of review in this case, petitioner's sentence as a career offender would be unaffected. At a minimum, the Court should defer addressing the standard of review applicable to relatedness determinations under Guidelines Section 4A1.2 until the Court is presented with a case in which the standard would be more likely to affect the ultimate outcome. Cf. Robert L. Stern et al., Supreme Court Practice 173 (7th ed. 1993) ("If the resolution of a clear conflict is irrelevant to the ultimate outcome of the case before the Court, certiorari may be denied.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 2000

JOINT

APPENDIX

(4)

Supreme Court, U.S.
FILED
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No. 99-9073

In The

Supreme Court of the United States

PAULA L. BUFORD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES

U.S. District Court
Eastern District of Wisconsin (Milwaukee)

CRIMINAL DOCKET FOR CASE #: 98-CR-210-ALL

10/22/98	1	COMPLAINT against Paula Louise Bufford signed by Mag Judge William E. Callahan. [2:98-m-471] (mkr) [Entry date 10/27/98]
		* * *
10/23/98	4	CJA Form 20 Copy 4 (Appointment of Counsel) as to Paula Louise Bufford; Attorney Robert A. Kagen appointed [2:98-m -471] (mkr) [Entry date 10/27/98]
		* * *
10/29/98	6	LETTER f/Judge Callahan re: deft.'s letter addressing discrepancies in her prior record. [2:98-m -471] (kmf) [Entry date 10/29/98]
11/3/98	7	INDICTMENT by USA Counts filed against Paula Louise Bufford (1) count (s) 1 (bdf) [Entry date 11/09/98]
		* * *
12/9/98	10	PLEA AGREEMENT as to Paula Louise Bufford (bdf) [Entry date 12/09/98]
		* * *
4/2/99	15	HEARING MINUTES: (JPS) Sentencing of Paula Louise Bufford (1) count (s) 1. SENT: 188 mos. imprisonment as to Count 1 of the Indictment. SUPERVISED RELEASE: 5 yrs. Conditions of Supervised Release imposed. See judgment for

additional details. FINE: Waived. RESTITUTION: $2,615.00 to: State Financial Bank. SA: $100.00. case terminated Court Reporter: Diane Meredith (kmf) [Entry date 04/06/99]

4/2/99 16 JUDGMENT and Commitment issued to U.S. Marshal as to Paula Louise Bufford by Judge J. P. Stadtmueller. (cc: all counsel) (kmf) [Entry date 04/06/99]

4/5/99 17 APPEAL Notice to USCA by defendant Paula Louise Bufford regarding [16-1]. (cc: all counsel) (kmf) [Entry date 04/06/99]

* * *

4/19/99 20 MOTION Enlarge the Appeal Record to include 1/27/99 PSR, 2/24/99 Addendum to PSR, and 3/26/99 Second Addendum to PSR by Paula Louise Bufford (tlf) [Entry date 04/19/99]

* * *

4/30/99 21 TRANSCRIPT of Sentencing Hearing held 4/2/99 for defendant Paula Louise Bufford (tlf) [Entry date 05/03/99]

* * *

6/17/99 – MARGINAL ORDER by Judge J P. Stadtmueller denying motion Enlarge the Appeal Record to include 1/27/99 PSR, 2/24/99 Addendum to PSR, and 3/26/99 Second Addendum to PSR [20-1] [Entry date 06/17/99]

* * *

2/4/00 24 MANDATE/CERTIFIED COPY w/slip opinion from USCA USCA Number:

99-1834 affirming the decision of the District Court [17-1] for defendant Paula Louise Bufford (tlf) [Entry date 02/08/00]

* * *

RELEVANT DOCKET ENTRIES

GENERAL DOCKET FOR
Seventh Circuit Court of Appeals No. 99-1834

4/8/99	Criminal case docketed. [99-1834] [1166297-1] Transcript information sheet due 4/19/99. Appellant's brief due 5/18/99 for Paula L. Bufford. Docketing Statement due 4/12/99. (joce)
	• • •
4/21/99	ORDER: Attorney Robert A. Kagen is APPOINTED to represent Appellant Paula L. Bufford pursuant to the Criminal Justice Act. [1171295-1] DW [99-1834] (chri)
	• • •
6/28/99	Filed 15c appellant's brief by Paula L. Bufford. Dist filed. [99-1834] [1192446-1] (hard)
6/28/99	Filed motion by Appellant Paula L. Bufford to seal supplemental appendix. [1192465-1] 10c supplemental appendix tendered. [0-0] [99-1834] (squi)
	• • •
6/29/99	ORDER re: Appellant's motion to seal appendix is DENIED as unnecessary. Because all of the documents contained in the supplemental appendix are public records, the appendix need not be sealed. The clerk is directed to file in the supplemental appendix INSTANTER. [1192465-1] JKL [99-1834] (land)

6/29/99	Filed 10e supplemental appendix by Appellant Paula L. Bufford, per order. [99-1834] [1194328-1] (land)
8/2/99	Filed 15c appellee's brief by USA. Disk filed. [99-1834] [1202952-1] (hans)
	• • •
11/17/99	Case heard and taken under advisement by panel: Circuit Judge Jesse E. Eschbach, Circuit Judge Frank H. Easterbrook, Circuit Judge Ilana D. Rovner. [99-1834] [1234306-1] (broo)
	• • •
1/12/00	Filed opinion of the court by Judge Easterbrook. The judgment of the District Court is AFFIRMED. Circuit Judge Jesse E. Eschbach, Circuit Judge Frank H. Easterbrook, Circuit Judge Ilana D. Rovner, [99-1834] [1166297-1] (patb)
1/12/00	ORDER: Final judgment filed per opinion. With costs: n. [99-1834] [1250817-1] (patb)
2/3/00	MANDATE ISSUED AND ENTIRE RECORD RETURNED. (Contents returned: 1 vol. pleadings; 2 vol. transcripts; 1 in camera envelope.) [99-1834] [1166297-1] (stef)
	• • •
4/18/00	Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No.: 99-9073. [99-1834] [1281786-1] (joce)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,	Case No. 98-Cr-[T.18, U.S.C. § 2113(a) & (d)]
Plaintiff,	98-Cr210
v.	INDICTMENT
PAULA LOUISE BUFFORD,	(Filed Nov. 3, 1998)
Defendant.	

COUNT ONE

THE GRAND JURY CHARGES THAT:

On March 18, 1998 in the State and Eastern District of Wisconsin,

PAULA LOUISE BUFFORD,

defendant herein, did by intimidation, take from the person or presence of another, to wit, a bank employee, approximately $2,615.00 in United States currency, belonging to and in the care, custody, control, management and possession of the State Financial Bank, 2650 N. Downer Avenue, Milwaukee, Wisconsin, an institution whose deposits were then insured by the Federal Deposit Insurance Corporation, and in committing such offense,

the defendant did assault another person, in violation of Title 18, United States Code, Sections 2113(a) & (d).

A TRUE BILL:

/s/ Timothy J. [Illegible]
FOREPERSON

Dated: November 3, 1998

/s/ Thomas P. Schneider
THOMAS P. SCHNEIDER
United States Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

PAULA LOUISE BUFFORD,

Defendant.

Case No. 98-Cr-210(JPS)

PLEA AGREEMENT

(Filed Dec. 9, 1998)

The Plaintiff, United States of America, by its attorneys, Thomas P. Schneider, United States Attorney for the Eastern District of Wisconsin, and David Robles, Special Assistant United States Attorney, and the defendant, Paula L. Bufford, individually and by Attorney Robert Kagen, pursuant to Rule 11 of the Federal Rules of Criminal Procedure, enter into the following plea agreement:

1. The defendant, Paula L. Bufford, has been charged in an indictment which alleges a violation of Title 18, United States Code, Sections 2113 (a) and (d).

2. The defendant, Paula L. Bufford, states and affirms that she has read the indictment and this plea agreement; that the charges and the terms and conditions of this plea agreement have been fully explained to her by her attorney; and that she fully understands the

charges contained in the indictment, the nature and elements of the crimes, and the terms and conditions of this plea agreement.

3. The defendant, Paula L. Bufford, voluntarily agrees to plead guilty to the one count indictment charging a violation of the Bank Robbery statute (18 U.S.C. § 2113(a) and (d)). A copy of the indictment is attached hereto and is also fully set forth below.

"On March 18, 1998 in the State and Eastern District of Wisconsin,

PAULA LOUISE BUFFORD,

defendant herein, did by intimidation, take from the person or presence of another, to wit, a bank employee, approximately $2,615.00 in United States currency, belonging to and in the care, custody, control, management and possession of the State Financial Bank, 2650 N. Downer Avenue, Milwaukee, Wisconsin, an institution whose deposits were then insured by the Federal Deposit Insurance Corporation, and in committing such offense, the defendant did assault another person, in violation of Title 18, United States Code, Sections 2113(a) & (d)."

4. The parties understand and agree that the offense to which the defendant will enter a plea of guilty carries the following maximum term of imprisonment and fine: 25 years imprisonment and $250,000.00. The count also carries a mandatory special assessment of $100.00, as well as the 5 years supervised release.

5. The parties understand and agree that in order to sustain the charge of Bank Robbery, the government must

prove each of the following propositions beyond a reasonable doubt:

a. That on March 18, 1998, in the State of Wisconsin and Eastern District of Wisconsin, Paula L. Bufford did:

1. take from the presence of a bank employee at State Financial Bank, 2650 N. Downer Avenue, Milwaukee, Wisconsin;

2. United States currency, totalling approximately $2,615.00;

3. said currency belonging to and in the care, custody, and control of State Financial Bank;

4. the State Financial Bank being an institution where those deposits were then insured by the Federal Deposit Insurance Corporation;

5. and said taking was by intimidation;

6. and in taking said property from the presence of the bank employee, the defendant did assault another person i.e. Paula Bufford did willfully threaten to inflict injury on the person of another by presenting a note representing that she had a bomb which she would set off if she did not receive said monies;

7. further, she did have in her possession a bag which she represented to contain a bomb.

6. The parties acknowledge, understand, stipulate, and agree:

a. that the defendant is, in fact, guilty of the offense described in paragraph 3 above, ~~and that the defendant, Paula L. Bufford, did~~

b. that no threats, promises, representations or other inducements have been made, nor agreements reached, other than those set forth in this agreement to induce the defendant to plead guilty;

c. that any sentence imposed by the court will be pursuant to the Sentencing Reform Act and the Sentencing Guidelines;

d. that the defendant's attorney has advised the defendant of the implications of the sentencing guidelines; a computation of those guidelines are attached and incorporated into this agreement;

e. that notwithstanding this agreement, or any recommendations or estimates of the parties and their attorneys, the sentencing judge will make his own determinations regarding any and all issues relating to the application of the sentencing guidelines;

f. that the sentencing judge is neither a party to nor bound in any way by this agreement, and that the judge may impose any sentence authorized by law up to the maximum penalties set forth in paragraph 4 above;

g. that pursuant to Sentencing Guidelines Manual § 1B 1.3, the sentencing judge will consider relevant conduct in calculating the guideline range, even if the relevant conduct is not the subject of the offense to which defendant is pleading guilty;

h. that the defendant may not move to withdraw his guilty plea solely as a result of the sentence imposed by the court; and

i. that absent any court order to the contrary, this plea agreement will be filed and become part of the public record in this case.

7. The government acknowledges, understands and agrees:

a. at this time, the government acknowledges, understands and agrees per the information currently available, that the defendant would qualify as a career offender pursuant to the Federal Sentencing Guidelines § 4B 1.1. As such, she would have an offense level of 34 and a criminal history category VI;

b. as authorized by Section 3E1.1 of the Sentencing Guidelines Manual, to recommend a three-level decrease for acceptance of responsibility but only if the defendant exhibits conduct consistent with the acceptance of responsibility;

c. to advise the sentencing judge of the nature and full extent of the defendant's cooperation, including all criminal activities in which the defendant participated and about which he has informed the government;

d. To make a recommendation in the "middle range" of the appropriate guidelines; and

e. The defendant agrees to make restitution in the amount of $2,615.00 to State Financial Bank.

8. Both parties reserve the right to:

a. apprise the district court and the probation office of any and all information which might be pertinent to the sentencing process including, but not limited to any and all conduct related to the offense as well as any and all matters which

might constitute aggravating or mitigating sentencing factors; and

b. make any recommendation regarding any and all factors pertinent to the determination of the sentencing guideline range; the fine to be imposed; the length of supervised release and the terms and conditions of the release; and any other matters not specifically addressed by this agreement.

9. In entering this agreement, the defendant, Paula L. Bufford, acknowledges and understands that in so doing she surrenders certain rights which include:

a. If the defendant persisted in a plea of not guilty to the charge against her, she would be entitled to a speedy and public trial by a court or jury. The defendant has a right to a jury trial. However, in order that the trial be conducted by the judge sitting without a jury, the defendant, the government and the judge all must agree that the trial be conducted by the judge without a jury.

b. If the trial is a jury trial, the jury would be composed of twelve citizens selected at random. The defendant and her attorney would have a say in who the jurors would be by removing prospective jurors for cause where actual bias or other disqualification is shown, or without cause by exercising peremptory challenges. The jury would have to agree unanimously before it could return a verdict of guilty. The court would instruct the jury that the defendant is presumed innocent until such time, if ever, as the government establishes guilt by competent evidence to the satisfaction of the jury beyond a reasonable doubt.

c. If the trial is held by the judge without a jury, the judge would find the facts and determine, after hearing all of the evidence, whether or not she

was persuaded of defendant's guilt beyond a reasonable doubt.

d. At such trial, whether by a judge or a jury, the government would be required to present witnesses and other evidence against the defendant. The defendant would be able to confront witnesses upon whose testimony the government is relying to obtain a conviction and she would have the right to cross-examine those witnesses. In turn the defendant could, but is not obligated to, present witnesses and other evidence in her own behalf. The defendant would be entitled to compulsory process to call witnesses.

e. At such trial, defendant would have a privilege against self-incrimination so that she could decline to testify and no inference of guilt could be drawn from her refusal to testify. If defendant desired to do so, she could testify on his own behalf.

10. The defendant, Paula L. Bufford, acknowledges and understands that by pleading guilty she is waiving all the rights set forth in the prior paragraph. The defendant further acknowledges the fact that her attorney has explained these rights to her and the consequences of her waiver of these rights.

11. This agreement supersedes all prior understandings, promises and/or conditions, if any, between this office and Paula L. Bufford. No additional understandings, agreements, promises, and/or conditions have been entered into other than those set forth in this agreement and none will be entered into unless in writing and signed by all parties.

12. In summary, Paula L. Bufford acknowledges, understands and agrees that she will plead guilty to Count One of the indictment as referenced in paragraph 3 above; that all crimes about which she has told the government and in which she has implicated herself, will be brought to the attention of the sentencing court as set forth in paragraph 8(b) above; that the government is recommending a three level acceptance of responsibility decrease but only if the defendant exhibits conduct consistent with the acceptance of responsibility.

Date: December 7, 1998 /s/ Paula L. Buford
Paula L. ~~Bufford~~ Buford
Defendant

Date: December 7, 1998 /s/ Robert Kagen
ROBERT KAGEN
Attorney for Defendant

Date: 12-9-98 /s/ Thomas P. Schneider
THOMAS P. SCHNEIDER
United States Attorney

Date: December 9, 1998 /s/ David Robles
DAVID ROBLES
Special Assistant United States Attorney

[1] UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

vs. Criminal No. 98-CR-210

PAULA LOUISE BUFORD,

Defendant.

TRANSCRIPT OF SENTENCING HEARING

Record made in the above-entitled matter before the Honorable J. P. Stadtmueller, Judge of said Court, on April 2, 1999, commencing at 8:35 a.m.

APPEARANCES

DAVID ROBLES and CHRISTIAN R. LARSEN, Assistant United States Attorneys, 530 U.S. Courthouse, 517 East Wisconsin Avenue, Milwaukee, WI 53202, on behalf of the United States of America.

ROBERT A. KAGEN, Attorney at Law, 740 North Plankinton Avenue, #334, Milwaukee, WI 53203, on behalf of the Defendant (present in court).

Proceedings recorded by machine shorthand, transcript prepared by computer-aided transcription.

Diane Meredith, RPR-CM
Official Court Reporter
517 E. Wisconsin Avenue, Rm. 400
Milwaukee, WI 53202
(414) 297-3779

[2] PROCEEDINGS

THE CLERK: The court calls Case No. 98-CR-210, United States versus Paula Buford for a sentencing hearing. May I have the appearances, please, beginning with the United States?

MR. ROBLES: Thank you. Appearing on behalf of the government, Special Assistant United States Attorney David Robles; also, Assistant United States Attorney Christopher Larsen.

MR. LARSEN: Good morning, your Honor.

MS. MORGAN: Good morning, your Honor. Jennifer Morgan from probation.

MR. KAGEN: Good morning, Judge. Paul Buford appears in person and by Robert Kagen.

THE COURT: Good morning, Mr. Robles. And good morning to you, Mr. Larsen, Ms. Morgan, Mr. Kagen. And good morning to you, Paula Buford.

Paula Buford, on December 14th of last year you entered a plea of guilty and were adjudged guilty as to a single-count indictment charging you with armed bank robbery in violation of Title 18 of the U.S. Code, Sections 2113 (a) and (d). We have now reached that stage of these proceedings where it is the duty of the court to address several questions to both you and Mr. Kagen.

First of all, Ms. Buford, have you had sufficient opportunity to review Ms. Morgan's presentence report prepared [3] in your case under date of January the 27th, as well as the two addenda to that report, first of which

was prepared under date of February 23rd and the second of which was prepared under date of March the 26th?

THE DEFENDANT: Yes, sir, I have.

THE COURT: Thank you.

Mr. Kagen, have you had sufficient opportunity to review those three documents?

MR. KAGEN: Yes.

THE COURT: Are there any facts that have been presented to the court in either the presentence or the two addenda that either you or your client disagree with or take exception to?

MR. KAGEN: That was the purpose of our letter objections, but other than those, no.

THE COURT: Well, I appreciate you had posed objections, but many times during the give and take of hearing the government's response and the probation department's analysis, those objections resolve themselves. So to the extent that you and your client have any objection, first, as to facts presented in the presentence report or the two addenda, now's your opportunity to again have the court address them in the context of the formal sentencing hearing.

MR. KAGEN: The main objection as set forth in our objections relate to the related case issue, and we have a [4] number of fact and legal objections that we set forth. The main issue is the sub-point three, consolidated for sentencing, issue. There were two other ways in which the cases could be related, the single occasion test

and the common scheme or plan test. My main focus was on the third of those, the consolidated for sentencing case or issue. I believe the case law set forth in my first objection shows the functional consolidation is the more logical way of dealing with this and that the angst of the Seventh Circuit is cured by the authority to upwardly depart.

There were some factual objections set forth in my motions, one of which I could think of offhand was that if the presentence in paragraph three was saying we had agreed that she was a career offender, that was not the case. I tried to see how the probation office came to that conclusion, and that, again, is set forth in the letter objection we filed. But, again, I think the main issue, I'm not abandoning the other two but I think the main focus here is consolidating for sentencing issue, and the functional consolidation theory is the more logical one to follow.

THE COURT: All right. Well, first, the minor matter of you and your client agreeing that Ms. Buford qualified as career criminal offender, the probation department has addressed that matter as a correction, and it is for that reason that there's no need for the court to further deal with [5] that this morning.

On the matter of the related case issue that underlies the two criminal convictions, that is, felony convictions addressed in Milwaukee County Circuit Court Cases F-920368 and F-920369, are there any additional facts that have not already been brought before the court either by you or by the government or the probation department that need to be made of record?

MR. KAGEN: No.

THE COURT: All right. With respect to the matter of the underlying facts, Mr. Robles and Mr. Larsen, are there any additional facts that you believe have not been brought to the court's attention with regard to the matter of the two circuit court cases and the consolidation issue that we have just heard from Mr. Kagen on?

MR. ROBLES: There is only one fact which goes to the issue of whether or not the armed robbery which occurred on January 23rd, 1992, was part of a common scheme or plan along with her drug dealing charge on that same date and her arrest. When she was arrested back in 1992, she was interviewed and at that point in time she indicated she began to sell – she began – she used to sell weed but in September of '91 she started to sell cocaine, and the reason that's significant is, by that point in time, there were already two armed robberies, one occurring on March 13th of 1990 and, I believe, the second occurring in May on that same date, the 13th of 1990.

[6] THE COURT: All right. Mr. Kagen, do you take issue with Mr. Robles' comment?

MR. ROBLES: I do have a copy of the show-up.

MR. KAGEN: To speed things up, I was not her counsel back then. I just asked her because I wouldn't have any way of knowing if the factual statement Mr. Robles made was correct. My client does acknowledge that it was correct.

THE COURT: All right. In the vernacular, to cut to the chase here, I think the only factual issue that drives whether or not these cases were consolidated or not is the

extent to which a record was made or perhaps, better stated, was not made before the Milwaukee County Circuit Court on the day of sentencing. It is quite obvious that the guilty pleas that were entered in these two cases numbered 368 and 369 were done on separate days before separate judges, and we only get to the matter of consolidation in terms of Judge Geske imposing sentence on May 21st of 1992. And relating those salient facts, it is clear that there was no agreement between the state and Ms. Buford and her counsel with regard to the consolidation of these cases, either for purposes of charging or for purposes of disposition. And, clearly, there was no agreement, beyond counsel now arguing by inference that there was a consolidation, that, in fact, consolidation was an integral part of the sentencing proceeding on May 21st of 1992. And so to the extent that either the government or you, Mr. [7] Kagen, have any additional argument you want to make, the court is simply left to draw from the record that was made before the Milwaukee County Circuit Court in May of 1992 as to whether or not these two cases were in fact consolidated, as that term is used in the context of the federal sentencing guidelines. One of the things that federal judges are not about to get involved in is revisionist history with respect to what may or may not have occurred before another court on another day in another jurisdiction. And so I am simply left to apply as best I can the provisions of the sentencing guidelines together with the applicable application notes to the relevant facts here, but to the extent that there is an inference of consolidation, I am left to conclude that the only inference of consolidation is the fact that sentences were imposed in two different cases on the same date before

the same judge, with no formal consolidation order. And when I say formal, I'm referring to something of record, either before a court reporter or a written document.

And, of course, the other fact that tends to undermine your current suggestion that these cases were in fact consolidated was the fact that two different assistant district attorneys appeared at the sentencing hearing with respect to each of their respective cases. And while that in the final analysis certainly is not controlling, it certainly goes a long way to suggest that, for many reasons that are left to the executive [8] branch of government, including state government, the matter of whether or not cases ought to be consolidated or charges read in or diverted is left to the discretion of the prosecutor. But I'm certainly willing to give you an opportunity to argue as you have in written form, Mr. Kagen, that your client does not meet the federal test for considering these offenses and sentences separately in light of the federal sentencing guidelines that she now is confronted with.

MR. KAGEN: I assume you don't want me to repeat what I've had filed here. I tried to get all the records I could, the transcripts from the state proceedings. And, again, I stand by what I filed. I think the Seventh Circuit's cases fall apart on scrutiny, simple scrutiny, and I think that the Ninth Circuit cases are quite clear that there is a trend towards considering functional consolidation. And as I said earlier, even today, there was tremendous angst in the Seventh Circuit about the effect of this, but there were some recent amendments that I've set forth in the written documents showing that there appears to be a compelling change in the application notes and that the safety valve is to upwardly depart. So,

again, I don't want to rehash everything I've filed. Obviously the court's studied it carefully.

THE COURT: Well, I guess by way of response, Mr. Kagen, I don't know which particular cases you have in mind that lead you to conclude that the Seventh Circuit somehow is [9] changing its attitude or policy in these situations to allow your client to have these two sentences considered consolidated. I may be missing something here, but based on the record that has been made factually, I don't even think this is a close case, to be quite candid. Now, if you've got something to suggest or if I have misread some of your submittal, I'll be happy to take the time to walk through it again this morning, but I'm reading in considerable detail, particularly the March 26th, the second addenda, in which you come back and challenge the probation department.

I'm interested in knowing what further rejoinder you have to the probation officer's response addressed on page four and five of the addenda, because I think Ms. Morgan has laid it out pretty cold, not to be trite, that these cases were not consolidated and ought not be considered by this court as consolidated for purposes of applying the otherwise applicable sentencing guidelines that drive the career offender status that is at bottom in this sentencing proceeding.

MR. KAGEN: My March 19th response did address the *Stalbaum* case, and I thought the government had taken that out of context. I think also, looking at what was cited by way of Wisconsin cases in *Stalbaum*, we see that they go back to 1800 statutes that really have no application here. And, again, I've set that forth in my

submissions. I just don't think that the Seventh Circuit cases are well grounded in current law. I [10] think, as a practical sense, what's happening is the functional consolidation issue that the Ninth Circuit is following and –

THE COURT: Well, regrettably the Ninth Circuit is not the Seventh Circuit, and when you go to the Ninth Circuit, regrettably, there is very little in the way of legal propositions that along the way you can't find some authority for and, as a consequence, in the view of this humble judge, there's not an awful lot of solace in particular cases from the Ninth Circuit because they're literally all over the map. And, more importantly, when the Seventh Circuit has spoken on the issue, there's no reason to go to another circuit with respect to the court's analysis.

And it may well be that this unique set of facts – although I don't think they're very unique in the final analysis – may cause my colleagues on the Seventh Circuit to take another view of all of this. And while I may be tipping my hand a bit here, I am unpersuaded on the state of the record that has been made, looking at all of the facts that are recited chapter and verse, both in the original presentence and then addressed twice over in these two addenda, that leads this court to conclude that, insofar as the operation of the federal sentencing guidelines, that these two state court cases were consolidated. Drugs and bank robberies may on occasion have common ground but in this instance they clearly did not.

And, again, this court is without any record to suggest [11] that the two prosecutors, Mr. Simpson and Mr. Stoiber, in the district attorney's office didn't have separate interests here. There were separate victims in the

bank robberies. The drugs were, other than the temporal relationship, unrelated. It wasn't as if she was charged with possession of drugs and robbery of someone to have obtained the drugs that she was charged with possessing. And it's a matter of having made or not having made an appropriate record. And all we, as federal judges, can do is put full faith and credit in the judgments and convictions that underlie and drive the defendant's criminal history score and apply the guidelines as best we can. But from the record that was made here, I am unwilling and unable, applying the relevant guidelines and the relevant case authority, to agree with Ms. Buford's position that these cases were consolidated and, therefore, the career offender provisions not be triggered and then somehow come back and depart from the guidelines in another fashion. I don't find on the record that that is at all appropriate.

And, fortunately, in this case, unlike several others that this court has recently had experience with, at least the government had the presence of mind to draw to Ms. Buford's attention before she pled guilty to this bank robbery that it was their view that she did qualify for career criminal offender status. So we are not dealing with a situation, as I have recently had to deal with others in your office, Mr. [12] Robles, where it appeared to the court that not only was the defendant and his attorney not aware of the implications of the career offender provisions but the assistant U.S. attorney, regrettably, never said anything. And I think it may have been because she was, although aware of career criminal offender, was not aware of the profound implications

under the sentencing guidelines. So at least we don't have that debacle to confront with in Ms. Buford's case.

So to the extent that the facts are presented here, I am constrained to conclude that the two cases that I referenced earlier, that is, F-920368 and F-920369, were not consolidated as related cases for U.S. Sentencing Guideline purposes.

Are there any other factual matters, Mr. Kagen, that you or your client wish to have the court address?

MR. KAGEN: Nothing other than what was in the submissions, no, Judge.

THE COURT: Thank you.

Mr. Robles, Mr. Larsen, do either of you have any objection as to any of the facts presented by Ms. Morgan in her presentence and the addenda?

MR. ROBLES: No, I do not.

THE COURT: That being the case, the court first adopts all of the facts that have been presented in the presentence report, concluding, as I have already put on the record, that the facts presented do not disclose a [13] consolidation of the two – of the underlying circuit court cases that would preclude the court applying the career offender provisions of the sentencing guidelines to Ms. Buford's criminal history score, triggering an enhancement in her offense level. And I will rely on those facts first in determining the ultimate sentencing guidelines that apply here, together with the ultimate sentence of the court.

Now, in recognition of the court's findings as to the facts, the probation department recommends the following guidelines as being applicable in this case. They include a total offense level of 31, a criminal history score of Roman numeral VI, a guideline term of imprisonment of 188 to 235 months, followed by at least three but not more than five years of supervised release, a fine of not less than $15,000 nor no more than $150,000, and, finally, a $100 special assessment.

Having made those findings and knowing how the court addressed the matter of the consolidation issue on the two state court cases, Mr. Kagen, do you and your client otherwise accept the guidelines as the probation department has recommended them?

MR. KAGEN: Yes.

THE COURT: Thank you.

Mr. Robles, do you and Mr. Larsen similarly accept the sentencing guidelines as recommended by the probation department?

[14] MR. ROBLES: Yes, we do, subject to our recommendation which is made in the plea agreement that I'll expound on.

THE COURT: All right. Thank you. That being the case and the court having no independent basis to take exception to or otherwise disagree with the guidelines as recommended, given my ruling on the underlying facts with regard to the relatedness issue of these two circuit court cases, I do herewith adopt each of the sentencing guidelines as recommended. Again, they include a total offense level of 31, a criminal history score of

Roman numeral V – or VI, a guideline term of imprisonment of 188 to 235 months, followed by at least three but not more than five years of supervised release, a fine of not less than $15,000, nor no more than $150,000, finally, a $100 special assessment.

Having made those findings, Mr. Kagen, do you know of any reason why the court ought not proceed this morning with the imposition of sentence in your client's case; and, if not, is there any statement that you or Ms. Buford would like to make in mitigation?

MR. KAGEN: We have no objection to the proceedings continuing and being completed today.

THE COURT: All right. And knowing that, is there any statement that you would like to make to the court and does your client wish to address the court?

MR. KAGEN: Yes.

[15] THE COURT: All right. You may proceed in any manner you deem appropriate.

MR. KAGEN: I'll comment first. The court obviously has very extensive submissions regarding my client's background. The court is aware she's no stranger to jails and prisons. This court had numerous contacts with her throughout the course of this case. I think that this case has had far more severe impact than the other cases despite the fact they were extremely numerous. I don't know if it's because this is now a federal case and the rules are different, but it's quite clear that it's had a severe effect on her.

Ms. Buford is age 43. Her mother's already passed away. Her grandmother is 84. With the court's ruling

today, it's quite clear that Ms. Buford will die – strike that, the grandmother will die before Ms. Buford gets out of prison. She understands that perhaps she may pass away in prison. She has a 15-year-old son who was at the prior scheduled proceeding. For some reason, he was not produced by Wisconsin social workers today, although I tried to arrange that. And, again, that has a significant impact on her. She sits here alone before this court facing sentencing today.

In talking to her, she tells me that the Ozaukee County Jail has broken her down. She never had suicidal thoughts before but has them now. Her family was unable to continue seeing her since November of last year. She can't mentally [16] stand to do the time away from home at some prison far from her friends and relatives, as may very well be the case here. She's lost her car, her furniture, all her possessions. She hasn't lost her son but can't see him. She won't be able to see the son or family if shipped out of state. And, obviously, the son will be of quite mature years by the time she ever gets out.

She does clearly understand she's not the victim in this case. She does realize that her act was quite serious. She had taken the money to pay bills and not buy drugs and, therefore, at the time was clearly sober and was clearly aware of the terror in the young gentleman teller's eyes as she placed the purported bomb on his teller desk and took the money. She realized how terrible her act was and she told a friend soon after the offense because she was so upset about this and may very well have been turned in by this friend because she felt the need to confide in someone else.

She has reviewed the discovery. She understands how terrorized that young male teller was, how terrorized the staff of the bank was and the terror to those in the vicinity of the bank who happened to be shopping or living in that area and seeing the bomb squad coming to the bank to find that she had only left a brick. And she understands that, again, she's not the victim for this and, having had a clear head at the time, understands the, enormity of what she's done.

[17] I found Ms. Buford to be very smart, extremely energetic. She has ability to give back to society instead of continually taking from society. She now understands she has to work in prison to be able to cope and survive a long period of institutionalization and to increase her educational skills so she won't have any need or thought of returning to crime upon release.

And, again, I think this case already, in the enormity of the sentence and the guidelines, has had a full chilling effect that was intended by Congress. Again, she's informed me that the Ozaukee County Jail has broken her down, caused her to evaluate herself, something she hadn't done before. She had completed the eleventh grade, obtained her G.E.D. and had completed course work in industrial and building maintenance at Lincoln College. While out, she also co-founded a Back-on-Track program in Union Grove, Illinois to work with young girls to keep them from turning to crime. She would like to further such efforts while in prison and/or after. She plans on using her time productively. She intends to pursue her education in prison or social work or the paralegal area. And, again, my numerous contacts with her show I'm convinced that she certainly has the skill

and the energy to successfully complete those educational endeavors.

She wants the court to order drug treatment. She tells me she never had it before. She understands she needs and wants [18] structure so she can learn what she has to do to avoid temptation the next time she feels down or would otherwise feel temptation to turn to drugs or crime.

I ask that she be given credit for having been very candid with the government in admitting she was guilty. She gave a prompt confession to the government upon her apprehension. She entered a very prompt plea in this case, and the original presentence, paragraph nine, described her as being, quote, completely cooperative, close quote. The presentence shows she was extremely candid to the presentence writer and also to prior state court presentence writers.

Again, the money she took from this case was used to pay rent, car payments and bills, not to live high on the hog. She is obviously unable to pay a fine if she's indigent. And, as you've already heard, the government agreed to recommend a middle range sentence, and that was set forth in the plea agreement. I think that even the low range would be far more than is necessary based on the facts summarized here, and I would ask for that. I believe Ms. Buford has a statement she wants to make.

THE COURT: All right. Thank you, Mr. Kagen.

Ms. Buford, is there any additional comments you would like to make, noting, of course, the court has received your letter which you wrote in advance of

today's hearing and I've considered that. So I appreciate your taking the time in the [19] solitude of confinement to put together the thoughts that you did. And, of course, having read the handwritten letter, which I assume and have no reason to question that you were the author of, why it is as an articulate person, as you seem to present yourself in that letter, that you ever found yourself going in for a couple of thousand dollars to jeopardize your entire role not only with your family but with society generally. So to the extent that you have any additional comments, now's your opportunity to present them.

THE DEFENDANT: Your Honor, thank you. I just want to say, above all things, that I'm very sorry for everything, for what I've put the employees of the bank through, the people in the neighborhood and everyone's family by robbing the bank and leaving the bag there, saying that there was a bomb inside. I can't even begin to imagine the fear or trauma that they all went through because of me. And I didn't think about the negative impact my foolish act would have on the employees, the, neighborhood residents or everyone's family.

My actions have tore me beyond description and have weighed very heavy on my mind every day. I can now still remember the expression on Mr. Peterson's face, and it makes me feel very, very sad to know that I instilled something like that in someone. I know I am not that type of person. I can't say I am sorry enough. I wish there was something I could do besides offer a mere apology. Maybe some day in some way I can. I [20] never set out to harm anyone physically, but it never occurred to me what I would do would affect everyone mentally. I'm very sorry.

This case, as Mr. Kagen has said, has actually had a big effect on me, sir. It was out of desperation and fear that I committed this crime. I had turned to different agencies and asked for help and to different people and asked for help and was turned down. So this is a decision that I made that I will regret for the rest of my life.

I do, as he mentioned, intend on furthering myself educationally. If God has it in his will that I may come out soon or sooner than expected, that I won't ever have to turn back to do anything like this again. I don't ever want to come back to jail again, never want to hurt no one else in any kind of possible way. I just ask the court to have mercy on me. I have written a letter to the employees of the bank, which I don't know if it's okay with the courts if I mail it, and if it is –

THE COURT: Well, what I would suggest that you do in that regard, you have Mr. Kagen deliver it to Ms. Morgan, and she in turn will ensure that it gets to the appropriate bank officials. You may continue.

THE DEFENDANT: Your Honor, as I've mentioned, I made a very bad decision. Prior to that date, I was drug-struck on everything. I was in a very clouded day. That day or prior to [21] that day I wasn't. This was a decision made, like I said, out of panic and desperation and fear, and I'm not sure if anyone here has ever had to live with desperation or be faced with it, but it is not a good feeling. But I am not taking it as I am feeling a victim. That's my fault. I just ask the court for mercy. No matter what the circumstances may be I know I won't ever commit another crime. I know I won't ever come back to jail. I do know that. I'm sorry, sir.

THE COURT: Thank you.

Mr. Robles, do you have any comments you would like to make?

MR. ROBLES: I just have a few comments. One, Ms. Buford has been candid and forthright, as she indicated. And as she has said through counsel as well, she immediately took responsibility for this offense, was forthright in her involvement and did enter a guilty plea early on. And the court, I'm sure, will take that into consideration.

The government is making a recommendation in the middle range of the appropriate guidelines, and we are also requesting that the court in its order ensure that restitution in the amount of $2,615 to State Financial Bank is part of that.

I think Ms. Buford, at this point in time, understands the danger of the situation that she put the bank employees in back on March 18th. The trouble is her history and her character demonstrates, one, from 19 – 1973 to 1990, it's almost [22] continuous, and that's unfortunate. Whether that's a product of disruptive family life she had at that point in time, that is something that is documented in the presentence report, and I'm sure that resulted in her involvement in the armed robberies which occurred beginning in 1990. In all those armed robberies, as the court is aware, a firearm was used to obtain property. At that juncture, she was willing to place the lives and safety of others in jeopardy.

Unfortunately, controlled substances seem to have been a part of her life as well since her arrest in '92. At

that point in time, when she spoke to the detectives, she said she had been dealing in marijuana. She also began dealing in cocaine in September of 1991. When she was in arrested in '92, there were 73.44 grams of cocaine as well as a loaded caliber pistol when she was recovered. After she was released on parole – presentence also addresses this – it was only a matter of days before she tested positive for marijuana use. She had positive tests on September 30, 1996, October 21st, September 22nd, October – I'm sorry, October 21st, 1996, September 22nd, 1998, October 23rd, 1998, and apparently her use of controlled substances did play a role in her losing employment. It was the reason she was terminated from the employment at Johnson Brass & Machinery Foundry, as she refused to take a drug test. And the report said she did test positive for drug usage a few days later.

[23] She has the capability to seek and obtain employment. Unfortunately, her history after her release on parole demonstrates that she was not able to follow through on that. There were four periods of unemployment that were employment that were either terminated as a result of her decision to terminate that employment or her employer's decision to terminate her as an employee, and that is unfortunate because that, I think, is important in her making it in the community, being a positive person, being a positive role model to her son, as well as demonstrating that, in fact, she has made some changes and has made some positive decisions about what she wants to do.

The appropriate guideline range the court has already addressed is level 31. That reflects her acceptance of responsibility. I believe that, as a result the fact that no

actual weapon was used in the armed robbery, as well as her acceptance of responsibility, the sentence imposed by the court should be in the middle range of the appropriate guidelines. Thank you.

THE COURT: Thank you, Mr. Robles.

Mr. Kagen, is there anything additional you want to add?

MR. KAGEN: I just find it incredible that she has the intelligence despite the horrible past and the upbringing she has. She's overcome all that to still have this intelligence that shines through. You know, you can't argue the pages and [24] pages of prior offense conduct, but apparently the federal indictment here has had the effect that the others didn't have, and obviously she is going to prison – going to prison for a long time. It's my opinion that the bottom of the range will accomplish the purpose here.

THE COURT: All right. Thank you. Well, in a nutshell, Ms. Buford, the underlying criminal record that you have over a period of 20-plus years put together for yourself is precisely what those that we send to the halls of Congress had in mind when Congress first adopted the sentencing guidelines in 1987 and, as part of that regimen, included career criminal offender status.

It may be an oversimplification but there is, without question, some corollary here, and that is throughout your young adult life, while you had numerous contacts with law enforcement, unfortunately law enforcement did not get your attention, nor did the criminal justice system get your attention in terms of getting on the

straight and narrow. One sentence after another, including the sentence you received for the armed robbery conviction in the state court, they're pathetic. And that's why it is so many states are now realizing that if they're going to make any significant inroads with regard to criminal conduct, they too have got to adopt determinate sentencing.

And it's expensive. For every year that I send you to [25] prison, it's costing the rest of us, as taxpayers, more than $20,000 a year. And you could get a pretty good college education for just one year of what it costs us to keep you in prison. And as you're aware, because of your career criminal offender status, the penalties have been ratcheted up very dramatically. In fact, the sentence that I'm obliged to impose, even at the low end of the guidelines, is more than double what you would have otherwise been eligible for, again, on the low end of the guidelines, had the career offender provisions not applied.

And what I'm going to do in your case, although Mr. Robles won't be terribly pleased, is sentence you at the low end of the guidelines for that reason, because we have already a doubling effect. And a sentence of 188 months, even if you earn all of your statutory good time, is going to result in your having to serve almost 160 months in prison, which is no small amount of time for a $2700 robbery.

As a consequence of the significant enhancement that the career criminal offender provisions provide in this case, against the backdrop of the totality of facts and

circumstances, including your acceptance of responsibility and not putting the government through a trial, I don't believe it's, frankly, in anyone's interest to pile on an additional two to three to four years in terms of the sentence. And so it's going to be my sentence in your case that you be sentenced [26] to a term of 188 months. I'm also not going to impose any fine in your case because you simply do not have the wherewithal to, even in a long prison sentence, accumulate a sufficient amount of money to pay a fine, particularly knowing that you're going to have to pay $2615 in restitution.

So this is the formal sentence of the court – which will also include a recommendation that the Bureau of Prisons evaluate you for treatment in a drug program, although I have to tell you that it is an extremely rare day, regrettably, that anyone who comes before the federal court does not have some sort of problem with drugs today and, as a consequence, while we would like everyone to benefit from drug treatment, the reality here is there are precious few inmates in any federal institution who do not deserve some form of drug treatment and the extent to which that treatment will be available to you is, in large measure, going to be driven by the Bureau of Prison's evaluation and classification system. And if, in the final analysis, you're not getting the treatment that you think you should get, keep in mind that there may be others that are in far worse straits than Paula Buford in terms of the need for that treatment. And it may be that you may not get it right away. It may take a little bit of time in terms of when it is more appropriate for you to get the treatment. It may be better later than earlier, what have you. So I say that at the outset lest you, be further

frustrated, knowing that the judge [27] agreed with you but somehow the Bureau of Prisons is not forthcoming in making it available in the manner and to the degree that you might otherwise expect.

This is the formal sentence of the court: Paula Louise Buford, on December 14th of last year you entered a plea of guilty and were adjudged guilty as to the single-count indictment charging you with armed bank robbery in violation of Title 18 of the U.S. Code, Sections 2113 (a) and (d). The court having asked you why judgment should not now be pronounced and pursuant to the Sentencing Reform Act of 1984, it is my judgment that you, Paula Louise Buford, be committed to the custody of the Bureau of Prisons to be imprisoned for a term of 188 months as to the offense of conviction in Count 1.

I further determine that based upon your limited financial resources, together with a large amount of restitution owed in this case, that you do not have the financial ability to pay a fine and, accordingly, the court waives any fine in your case. Pursuant to the Mandatory Victim's Restitution Act of 1996, you're ordered to pay restitution in the amount of $2,615. That restitution is due and payable to State Financial Bank to the attention of Ron Knaus, K-n-a-u-s, Assistant Vice President, 2650 North Downer Avenue, Milwaukee, Wisconsin, 53211. The court waives any interest on the restitution. The court considers your participation in the Federal Bureau of Prisons Inmate Financial Responsibility Program to be a [28] necessary component toward the repayment of this restitution obligation. Payments under that program shall apply first toward the special assessment that I will later

impose and then to the restitution until both are paid in full.

Upon release from imprisonment, you shall be placed on supervised release for a term of five years. While on supervised release, you shall not commit any federal, state or local crimes and shall comply with the standard conditions that have been adopted by the court and shall comply with the following additional conditions:

First, within 72 hours of release from the custody of the Bureau of Prisons, you shall report in person to the probation office in the district to which you have been released. Second, you are not to possess any firearm or other dangerous weapon. Third, pursuant to the Violent Crime Control and Law Enforcement Act of 1994, you shall not illegally possess any controlled substance for such possession will result in revocation of the supervised release term and you will be obliged to serve a further term in prison.

Fourth, you are to participate in a program of testing and residential or outpatient treatment for drug and/or alcohol abuse as directed by your supervising probation officer until such time as you are released from such program. You are to refrain from the use of all alcoholic beverages throughout the period of your supervised release term.

[29] Following release from imprisonment, you are to reside for the first 90 days in a community correctional center upon the first available vacancy. You are to obey all of the rules of that facility. Sixth, you are to participate in a mental health treatment program and take any and all prescribed medications as directed by the treatment

provider and participate in any psychological or psychiatric evaluations or counseling as directed by your supervising probation officer.

Seventh, you are to pay the balance of any restitution that may be due and owing at a rate of not less than $50 per month. Eighth, you are to provide access to all financial information required by your supervising probation officer. In accordance with the Mandatory Victims Restitution Act of 1996, as provided for in 18 U.S.C. Section 3013, you are ordered to pay a special assessment in the amount of $100. That special assessment is due and payable immediately at the Office of the Clerk of the Court, located in Room 362 of this building.

Having entered a plea of guilty to the underlying offense, I now advise you that if you believe that the guilty plea that you earlier entered was involuntary or otherwise contrary to law or that the sentence that the court imposed in your case this morning was in violation of either the sentencing guidelines or contrary to law, or that the court misapplied any of the sentencing guidelines to the facts of your case, I now advise you of your right to appeal. If you elect to appeal, a [30] notice of appeal must be filed within ten days of today's date or you will have waived your right to appeal.

Finally, if you so request; you have the right to appeal in forma pauperis and also to have the clerk of the court file a notice of appeal on your behalf.

Mr. Kagen, if you or your client has any recommendation for the court to include in the judgment and commitment order beyond my recommendation that she be

evaluated for appropriate drug treatment, I'll be happy to include that as well.

MR. KAGEN: I would ask for an institution somewhere in the Chicago-Milwaukee metropolitan area.

THE COURT: All right. I believe the closest facility, Ms. Morgan, is at Pekin, Illinois, is that correct?

MS. MORGAN: That's correct, your Honor.

THE COURT: All right. I'll include that as the court's recommendation, again recognizing, of course, that the Bureau of Prisons is not always able to accommodate the court's recommendation either because of prison classification requirements in terms of security risks or this issue of drug treatment. It may be more available at another facility instead of Pekin, but we'll include that as the court's recommendation.

Are there any other matters that we need address in this case, Mr. Kagen?

MR. KAGEN: Finally, Judge, she would ask that the [31] clerk enter a notice of appeal. She is indigent. I don't know who would be appointed.

THE COURT: You have not been relieved and if you choose not to represent Ms. Buford on appeal, that is a matter that you must address with the Court of Appeals. The Court of Appeals has, in essence, precluded us at the district court level granting counsel leave to withdraw until they've had a chance to address whatever concerns you or your client may have first with regard to the matter of an appeal generally. And so while the clerk of the court certainly is free to, at your request, prepare and file a notice of appeal on her behalf, you should

understand that you have not been relieved as her counsel. That is a matter that you will have to address with the Seventh Circuit Court of Appeals at the appropriate time.

Mr. Robles and Mr. Larsen, do you have any other matters?

MR. ROBLES: No, your Honor.

THE COURT: All right. Court stands in recess.

(Proceedings concluded at 9:30 a.m.)

[32] CERTIFICATE

I, Diane Meredith, Official Court Reporter, United States District Court, Eastern District of Wisconsin, do hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated this 23rd day of April, 1999.

s/
Diane Meredith, RPR-CM
Oficial Court Reporter

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA

v.

PAULA LOUISE BUFORD
a/k/a "Paula L. Bufford"

JUDGMENT IN A CRIMINAL CASE
Case Number: 98-CR-210-001

Robert A. Kagen
Defendant's Attorney

David Robles
Special Assistant United States Attorney

(Filed Apr. 2, 1999)

THE DEFENDANT:

pleaded guilty to Count One of the Indictment.

Title & Section	Nature of Offense	Date Concluded	Counts(s)
18 U.S.C. § 2113(a) & (d)	Armed Bank Robbery	3/18/98	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Date Sentence Imposed:
April 2, 1999

Defendant's Soc. Sec. No.: 336-48-7337
Defendant's Date of Birth: 8/10/55
Defendant's USM No.: 05422-089
Defendant's Legal Address:
9510 West Fond du Lac Avenue
Apartment 22
Milwaukee, WI 53225

Date Sentence Imposed:
April 2, 1999

/s/ J.P. Stadtmueller
J.P. Stadtmueller
Chief Judge

April 2, 1999
Date Judgment Signed

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of one hundred eighty-eight (188) months as to Count One of the indictment.

The defendant is remanded to the custody of the United States Marshal.

The court makes the following recommendation to the Bureau of Prisons:

(1) that the defendant be evaluated for her participation in a drug treatment and counseling program; and

(2) that the defendant be incarcerated at FCI – Pekin, IL.

RETURN

I have executed this judgment as follows:

Defendant delivered on ___ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a total term of five (5) years as to Count One of the indictment.

The defendant shall not commit another federal, state, or local crime and shall comply with the following special conditions:

1. The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

2. The defendant shall not possess a firearm as defined in 18 U.S.C. § 921 or any other dangerous weapon.

3. Pursuant to the Violent Crime Control and Law Enforcement Act of 1994, the defendant shall not illegally possess any controlled substance. Such possession will result in revocation of the supervised release term and

the defendant will be obligated to serve a further term in prison.

4. The defendant shall participate in a program of testing and residential or outpatient treatment for drug and alcohol abuse, as directed by her supervising probation officer, until such time as the defendant is released from such program. The defendant is to refrain from the use of all alcoholic beverages throughout the period of her supervised release term.

5. After release from imprisonment, the defendant is to reside for the first 90 days in a community correctional center upon the first available vacancy. The defendant is to obey the rules of that facility.

6. The defendant shall participate in a mental health treatment program and shall take any and all prescribed medications as directed by the treatment provider and participate in any psychological/psychiatric evaluation and counseling as may be directed by her supervising probation officer.

7. The defendant shall pay any balance of the restitution at a rate of no less than $50.00 per month.

8. The defendant is to provided access to all of the financial information required by her supervising probation officer.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set

forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or his or her supervising probation officer.

2. The defendant shall report to his or her supervising probation officer and shall submit a truthful and complete written report within the first five days of each month.

3. The defendant shall answer truthfully all inquiries by his or her supervising probation officer and follow the instructions of his or her supervising probation officer.

4. The defendant shall support his or her dependents and meet other family responsibilities.

5. The defendant shall work regularly at a lawful occupation unless excused by his or her supervising probation officer for schooling, training, or other acceptable reasons.

6. The defendant shall notify his or her supervising probation officer ten days prior to any change in residence or employment.

7. The defendant shall refrain from excessive use of alcohol.

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by his or her supervising probation officer.

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of his or her supervising probation officer.

11. The defendant shall notify his or her supervising probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13. As directed by his or her supervising probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit his or her supervising probation officer to make such notification and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5 Part B.

	Assessment	Fine	Restitution
Totals:	$100.00	$0	$2,615.00

FINE

Based on the defendant's limited finances the court determines that the defendant does not have the financial ability to pay a fine, costs of incarceration, costs of community confinement or supervision and therefore waives the fine, costs of incarceration, costs of community confinement and cost of supervision in this case.

A waiver of the cost of community confinement does not preclude the Bureau of Prisons from imposing a subsistence fee of up to 25 percent of gross income, based on ability to pay, for any portion of the sentence spent in a community correctional facility.

RESTITUTION

The defendant shall pay restitution to the following payee in the amount listed below. The court waives interest on the restitution.

Name of Payee	**Total Amount of Loss	Restitution Ordered
State Financial Bank ATTN: Ron Knaus Assistant Vice President 2650 North Downer Avenue Milwaukee, WI 53211	$2,615.00	$2,615.00
Totals:	$2,615.00	$2,615.00

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution. Special instructions regarding the payment of criminal monetary penalties:

The $100.00 special assessment is due and payable immediately to the Clerk of Court's office, Room 362, U.S. Courthouse.

The court considers the defendant's participation in the Federal Bureau of Prisons Inmate Financial Responsibility Program a necessary part of the repayment of the court-imposed financial obligations. Payments are to apply first to the special assessment and then to the restitution until paid in full.

During any period of supervised release, the defendant shall pay any balance of the restitution at a rate of no less than $50.00 per month.

** Findings for the total amount of losses are required under Title 18 of the United States Code, Chapters 109A, 110, 110A and 113A.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All Criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, his or her supervising probation officer, or the United States Attorney.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application contained in the 1/27/99 presentence report as updated and modified by the 2/23/99 and 3/26/99 addenda to that report. Furthermore, the court determines that the Milwaukee county Court did not consolidate the defendant's cases (numbers F-920368 and F-920369) for purposes of the 5/21/92 sentencing and that therefore they constitute two separate offenses.

Guideline Range Determined by the Court:

Total Offense Level: 31

Criminal History Category: VI

Imprisonment Range: 188 to 235 months

Supervised Release Range: 3 to 5 years

Fine Range: $15,000.00 to $150,000.00 (with costs of imprisonment/supervision)

Fine waived because of inability to pay.

Restitution: $2,615.00

$100.00 special assessment

This sentence is within the guidelines range, that range exceeds 24 months, and the sentence is imposed for the following reason:

(1) because of the seriousness and risk of harm of the defendant's offense in combination with her prodigious criminal history.

In the
United States Court of Appeals
for the Seventh Circuit

No. 99-1834

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PAULA L. BUFORD,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 98-CR-210 – **J.P. Stadtmueller**, *Chief Judge.*

ARGUED NOVEMBER 17, 1999 –
DECIDED JANUARY 12, 2000

Before ESCHBACH, EASTERBROOK, and ROVNER, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Following her plea of guilty to armed bank robbery, see 18 U.S.C. § 2113(a) and (d), Paula Buford was sentenced to 188 months' imprisonment. The judge calculated an offense level of 31 (including all adjustments) after finding that she is a career offender. This led to a sentencing range of 188 to 235 months' imprisonment. If she is not a career offender, then her sentencing range is only 84 to 105 months.

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1. Buford was 42 when she robbed the bank; armed bank robbery is a "crime of violence", see U.S.S.G. § 4B1.2(a)(1), even though the object Buford described as a bomb would not have exploded; and she has more than 22 prior convictions. Details of many convictions are missing from the record, because state courts have destroyed relevant documents (most of the crimes are more than a decade old) and Buford has not turned over information in her own possession. But the district judge counted five more-recent convictions that meet the standard of § 4B1.1. In 1992 Buford was convicted in a Wisconsin court of four armed robberies and possessing cocaine with intent to deliver it.

Five exceeds two, but this does not end the discussion, because a definitional provision in § 4B1.2(c)(2) says that, when counting convictions for purposes of the career offender provision, the judge must determine that "at least two of the aforementioned felony convictions are counted separately under the provisions of § 4A1.1(a), (b), or (c)." Turning back to § 4A1.2(a)(2) we find: "Prior sentences imposed in unrelated cases are to be counted separately. Prior sentences imposed in related cases are to be treated as one sentence for purposes of § 4A1.1(a), (b), and (c)." So when are cases "related"? Application Note 3 to § 4A1.2 offers this advice:

> Prior sentences are not considered related if they were for offenses that were separated by an intervening arrest (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense). Otherwise, prior sentences are considered related if they resulted from offenses that (A) occurred on the same occasion, (B) were part of a single common scheme or plan, or (C) were consolidated for trial or sentencing.

Buford's four armed robberies and one drug offense did not occur on the same occasion. See *United States v. Hudspeth*, 42 F.3d 1015 (7th Cir. 1994) (en banc) (defining "occasion" for purposes of 18 U.S.C. § 924(e)(1), the Armed Career Criminal statute). Nor were they part of a common scheme or plan. The district court sensibly rejected Buford's argument that all crimes designed to raise revenue are related by that objective, which would treat a one-woman crime wave as having but a single countable offense and thus negate the principal function of the career offender guideline. Buford therefore relies on (C), asserting that the cases were consolidated for sentencing. As is frequently true, the details are messy and defy easy characterization – and the Sentencing Commission has not offered guidance on intermediate situations.

Buford was arrested in Milwaukee on January 23, 1992, after robbing a gas station at gunpoint. A search of her residence turned up a pistol, the loot, and 73 grams of cocaine. Buford confessed to three additional armed robberies of gas stations during 1990 and 1991. On January 27, 1992, state prosecutors filed two criminal complaints against Buford. The first charged her with committing five armed robberies. The second charged the drug

offense and was assigned to a branch of the circuit court designated to handle drug prosecutions. Wis. Stat. § 753.061(2). The cases were handled by different prosecutors and assigned to different judges. Buford pleaded guilty to four of the robberies and to the drug charge in separate hearings before the different judges. Sentencing in both prosecutions occurred on May 21, 1992, before the judge who had been assigned to the drug case. The record does not include an order of consolidation, though it does contain a letter from Buford's lawyer consenting to the procedure. The judge then imposed three sentences: 6 years for the drug offense; 12 years for two of the robberies; and 15 years for the other two robberies. These sentences ran concurrently. Two judgments (one for the robbery counts and one for the drug count) were entered. Wisconsin did not follow a truth-in-sentencing approach back in 1992; the 15-year sentence was "withheld" (a form of probation), and the 12-year term of imprisonment ended in less than 6 years, allowing Buford to rob a bank in 1998. Her federal 188-month sentence, which amounts to 15 years and 8 months, will keep her in prison for much longer than her state "15-year" sentence. (Wisconsin adopted a true-sentence approach effective January 1, 2000, too late for Buford.)

Everyone agrees that the four armed robberies were consolidated with each other for trial and sentencing and thus count as but a single crime of violence for purposes of § 4B1.1. Buford contends that the imposition of sentence by a single judge on a single occasion was a consolidation of the drug offense with the armed robberies for sentencing, within the meaning of Application Note 3.

The federal prosecutor replies that there was no *consolidation*: there is no order of consolidation, and separate judgments were entered following the sentencing. We have held that joint sentencing for administrative convenience is not "consolidation for sentencing" under Application Note 3. *United States v. Bomski*, 125 F.3d 1115, 1119 (7th Cir. 1997); *United States v. Stalbaum*, 63 F.3d 537, 539 (7th Cir. 1995); *United States v. Russell*, 2 F.3d 200, 204 (7th Cir. 1993). But we have also held that a formal order of consolidation is unnecessary, and that cases may be deemed functionally consolidated when they are factually or logically related, and sentencing was joint. *United States v. Joseph*, 50 F.3d 401 (7th Cir. 1995). Here a single sentencing hearing, informed by a single presentence report, ended in concurrent sentences. Buford contends that her crimes were related through her addiction and would have been charged in a single indictment or information but for Wisconsin's decision to require drug prosecutions to be handled separately. This is not so clear; Wisconsin follows the approach of Fed. R. Crim. P. 8(a), see Wis. Stat. § 971.12(1), and it might be hard to characterize the robberies and drug offense as "of the same or similar character or . . . based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Anyway, the separate drug court cuts both ways: the crimes *might* have been consolidated but for their assignment to separate branches, but the separation shows that Wisconsin does not want such prosecutions consolidated – and Application Note 3 defers to the state's practice on consolidation rather than creating an

independent federal rule. (Wisconsin's provision for separation is not airtight; the branches designated under § 753.061(2) are to handle drug cases "primarily" but not exclusively, which is why a single judge was able to sentence Buford for both the robberies and the drug offense. But the statute assuredly disfavors consolidation.)

Because elements of Buford's situation support either characterization, the standard of appellate review may be dispositive. If review is deferential, then affirmance follows straightaway, for the district court's conclusion that Buford's state cases were not functionally consolidated for sentencing cannot be called clearly erroneous. But if our role is to make a *de novo* decision, then this appeal could come out either way. What, then, is the right appellate posture? Until recently the court has treated this as an unresolved question. See *United States v. Carroll*, 110 F.3d 457, 460 (7th Cir. 1997); *United States v. Woods*, 976 F.2d 1096, 1099 (7th Cir. 1992); *United States v. Connor*, 950 F.2d 1267, 1270 (7th Cir. 1991); *Joseph*, 50 F.3d at 404; *Russell*, 2 F.3d at 204. Within the last few months two panels have taken a firm stance – but unfortunately the panels do not agree with each other, and the more recent panel did not acknowledge the prior, contrary decision. Compare *United States v. Joy*, 192 F.3d 761, 770 (7th Cir. 1999) (relatedness is a factual issue reviewed only for clear error), with *United States v. Jackson*, 189 F.3d 655, 658 (7th Cir. 1999) (all questions about application of the career offender guideline are reviewed *de novo*). Neither *Joy* nor *Jackson* gives a reason for its conclusion or evinces awareness that the issue had been reserved by earlier panels. Divergence within the circuit mirrors a conflict

among the circuits. Six review "relatedness" issues deferentially, while three engage in *de novo* decisionmaking. See *United States v. Correa*, 114 F.3d 314, 317 (1st Cir. 1997) (*de novo*); *United States v. Mapp*, 170 F.3d 328, 338 (2d Cir. 1999) (deferential); *United States v. Huggins*, 191 F.3d 532, 539 (4th Cir. 1999) (deferential); *United States v. Huskey*, 137 F.3d 283, 285 (5th Cir. 1998) (de novo); *United States v. Irons*, 1999 U.S. App. LEXIS 26887 at *9-10 196 F.3d 634, 638 (6th Cir. 1999) (deferential); *United States v. Bartolotta*, 153 F.3d 875, 879 (8th Cir. 1998) (deferential); *United States v. Allen*, 153 F.3d 1037, 1045 (9th Cir. 1998) (*de novo*); *United States v. Wiseman*, 172 F.3d 1196, 1219 (10th Cir. 1999) (deferential); *United States v. Mullens*, 65 F.3d 1560, 1565 (11th Cir. 1995) (deferential). By revisiting the subject, we can create at least intra-circuit harmony.

"Relatedness" and "consolidation" are not pure questions of law. No legal rule specifies what it means for cases to be "consolidated for sentencing." If in *Joseph* we had adopted the view that "consolidation" is a matter of form – cases are consolidated if there is an order of consolidation, otherwise not – then it would make sense to engage in *de novo* consideration. A record either contains an order of consolidation or it doesn't, which dictates a legal outcome – though if the existence of the order were debatable, the district judge's resolution of that wholly factual issue would be reviewed deferentially. But once *Joseph* adopted a functional approach to consolidation, it became impossible to say that one characterization rather than another is mandatory. We have instead a classic mixed issue, where the court must apply legal norms to classify the facts. And disputes about the proper characterization of events, when legal norms guide rather

than determine the answer, are principally committed to district courts, with deferential appellate review. Thus even though a finding of racial discrimination requires the application of law to facts, the existence of discrimination is itself a "fact" and review is for clear error only. *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982). Whether an employee is a "seaman" under a multi-factor balancing approach likewise is a question of fact, with deferential appellate review. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986). Even the question whether a complaint is "frivolous" for purposes of Fed. R. Civ. P. 11 – a subject that requires no fact-finding by the district court – is reviewed deferentially. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401-05 (1990).

Cooter & Gell holds that when the legal inquiry resists statement as a rule of general applicability, and when the application of that rule is a case-specific determination, courts of appeals should treat the district judges' conclusions deferentially. Our own cases likewise emphasize that matters of characterization and application, which lack general significance to other litigants, are best resolved by the district court, with a light appellate touch. See, e.g., *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928 (7th Cir. 1989) (en banc); *Morton Community Unit School District No. 709 v. J.M.*, 152 F.3d 583 (7th Cir. 1998); *Mucha v. King*, 792 F.2d 602, 604-06 (7th Cir. 1986); *Scandia Down Corp. v. Euroquilt, Inc.*, 772 F.2d 1423, 1428-29 (7th Cir. 1985). As the second circuit put the point in *Mapp*, 170 F.3d at 338 n.15, deferential review is appropriate "[b]ecause of the (obviously) fact-intensive nature of the inquiry and because a sentencing court's findings regarding factual relatedness in any given case are

unlikely to establish widely-applicable principles of law". (None of the three circuits that has gone the other way has offered a reasoned explanation for the choice, and the fifth circuit in *United States v. Garcia*, 962 F.2d 479, 481 (5th Cir. 1992), explained that although the argument for deferential review is "compelling," the circuit would continue to use *de novo* review because of unexplained prior decisions.)

How best to understand the events in the Wisconsin courts in spring 1992 has no significance beyond these parties. Someone has to select a characterization of complex facts, and the best candidate for that role is the district judge. Questions concerning application of the Guidelines generally are reviewed deferentially, see *Koon v. United States*, 518 U.S. 81, 96-100 (1996), unless the district court makes an identifiable legal mistake; that principle is as applicable to "relatedness" as it was to the questions under review in *Koon*. We hold accordingly that whether cases have been "consolidated" for trial or sentencing is a matter of fact, to be reviewed deferentially by the court of appeals. Other issues in the application of the career-criminal guideline may be strictly matters of law with general application, and for those issues review would be plenary. Because this conclusion resolves a conflict among panels of this court, it was circulated to all active judges under Circuit Rule 40(e). None of the judges favored a hearing en banc.

The district judge did not commit a clear error in finding that the joint sentencing was a matter of administrative convenience rather than a "consolidation for sentencing." Separate sentences were imposed and separate judgments entered. Treating Buford as a career offender

makes a good deal of sense; her lengthy record demonstrates that she is an incorrigible criminal who regularly uses weapons (or, in her latest robbery, the threat of a bomb). With a record of convictions past two dozen, she is a "career" offender.

AFFIRMED

A true Copy:

Teste:

/s/ [Illegible]
Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: January 12, 2000

BEFORE:

Honorable JESSE E. ESCHBACH, Circuit Judge

Honorable FRANK H. EASTERBROOK, Circuit Judge

Honorable ILANA DIAMOND ROVNER, Circuit Judge

No. 99-1834

UNITED STATES OF AMERICA,

Plaintiff – Appellee

v.

PAULA L. BUFORD,

Defendant – Appellant

Appeal from the United States District Court for the Eastern District of Wisconsin
No. 98 CR 210, J. P. Stadtmueller, Chief Judge

The judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered on this date.

(1061-110393)

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

September 26, 2000

WILLIAM K. SUTER
CLERK OF THE COURT

Mr. Robert A. Kagen
Goldstein & Kagen
740 N. Plankinton Ave., #334
Milwaukee, WI 53203

Re: Paula K. Buford
v. United States
No. 99-9073

Dear Mr. Kagen:

The Court today entered the following order in the above entitled case:

The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, November 13, 2000. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, December 13, 2000. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, December 29, 2000. Rule 29.2 does not apply.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

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(5)

Supreme Court, U.S.
FILED
NOV 1 3 2000
CLERK

No. 99-9073

In The

Supreme Court of the United States

PAULA L. BUFORD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR THE PETITIONER

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47 pp

QUESTION PRESENTED

The district court found Petitioner's prior convictions in state court not "related" under § 4A1.2(a)(2) of the United States Sentencing Guidelines. Should the court of appeals have reviewed that conclusion de novo, rather than for clear error?

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The United States Court of Appeals for the Seventh Circuit published its opinion, Joint Appendix (App.) 54-63, which is reported at 201 F.3d 937 (2000). The oral decision of the United States District Court for the Eastern District of Wisconsin, App. 16-43, went unreported.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered judgment on January 12, 2000. Petitioner filed a petition for a writ of certiorari on April 10, 2000, which this Court granted on September 26, 2000. The Court's jurisdiction rests on 28 U.S.C. § 1254(1).

SENTENCING GUIDELINE PROVISIONS INVOLVED

§ 4A1.2 Definitions and Instructions for Computing Criminal History

(a) Prior Sentence Defined

(2) Prior sentences imposed in unrelated cases are to be counted separately. Prior sentences imposed in related cases are to be treated as one sentence for purposes of § 4A1.1(a), (b), and (c). Use the longest sentence of imprisonment if concurrent sentences were imposed and the aggregate sentence of imprisonment imposed in the case of consecutive sentences.

§ 4A1.2 Commentary, Application Note 3

Related Cases

Prior sentences are not considered related if they were for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). Otherwise, prior sentences are considered related if they resulted from offenses that (A) occurred on the same occasion, (B) were part of a single common scheme or plan, or (C) were consolidated for trial or sentencing. The court should be aware that there may be instances in which this definition is overly broad and will result in a criminal history score that underrepresents the seriousness of the defendant's criminal history and the danger that he presents to the public. For example, if a defendant was convicted of a number of serious non-violent offenses committed on different occasions, and the resulting sentences were treated as related because the cases were consolidated for sentencing, the assignment of a single set of points may not adequately reflect the seriousness of the defendant's criminal history or the frequency with which he has committed crimes. In such circumstances, an upward departure may be warranted. Note that the above example refers to serious non-violent offenses. Where prior related sentences result from convictions of crimes of violence, § 4A1.1(f) will apply.

§ 4B1.1 Career Offender

A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior

felony convictions of either a crime of violence or a controlled substance offense. If the offense level for a career criminal from the table below is greater than the offense level otherwise applicable, the offense level from the table below shall apply. A career offender's criminal history category in every case shall be Category VI.

Offense Statutory Maximum	Offense Level*
(A) Life	37
(B) 25 years or more	34
(C) 20 years or more, but less than 25 years	32
(D) 15 years or more, but less than 20 years	29
(E) 10 years or more, but less than 15 years	24
(F) 5 years or more, but less than 10 years	17
(G) More than 1 year, but less than 5 years	12.

* If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

§ 4B1.2 Definitions of Terms Used in Section 4B1.1

(c) The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of

violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of § 4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

STATEMENT OF THE CASE

Congress established the United States Sentencing Commission and a sentencing guideline regimen to achieve uniform sentences for similarly situated federal offenders. Consistent application of the Sentencing Guidelines' terms advances uniformity in sentencing. This case invites the Court to decide whether the federal appellate courts will control the ultimate conclusions that determine which prior convictions are "related" under U.S. SENTENCING GUIDELINES MANUAL § 4A1.2. That mixed question of relatedness often bears significantly on the length of sentence a district court imposes.

This case is a good example. Petitioner Paula Buford robbed a bank, faced indictment in federal court, and pled guilty. At sentencing, the district judge decided that earlier state court sentences imposed concurrently by the same judge during the same hearing, but in cases bearing different docket numbers for reasons peculiar to that state court, were not "related" for purposes of § 4A1.2. That decision roughly doubled Petitioner's sentencing guideline range.

On appeal, the United States Court of Appeals for the Seventh Circuit acknowledged that the standard of review might determine the outcome. Other circuits had split on the question. The Seventh Circuit chose a deferential standard to assess whether the prior state convictions were related, and affirmed. Broadly, those facts bring Petitioner before this Court.

1. In closer detail, Petitioner robbed a bank in Milwaukee, Wisconsin, on March 18, 1998. A federal grand jury indicted her for armed bank robbery, 18 U.S.C. § 2113(a) & (d). She pled guilty less than six weeks later. App. 6-7, 17.

At sentencing, the parties disputed whether two prior state court convictions were "related" under § 4A1.2 of the Sentencing Guidelines and its application note 3. App. 18-26. If related, then those cases counted only as one conviction, and Petitioner's sentencing guideline range was 84-105 months. App. 54. If unrelated, the two cases counted as two convictions, the career offender guideline (U.S. SENTENCING GUIDELINES MANUAL § 4B1.1) applied, and the guideline range jumped to 188-235 months. App. 54. The district court resolved the dispute against Petitioner, App. 23-28, and sentenced her to the bottom of the higher range, 188 months. App. 39, 45. Petitioner now serves that 15-year, 8-month sentence. The maximum sentence under the lower range would have been 8 years, 9 months.

2. The disputed earlier state court cases both arose from Petitioner's arrest on January 23, 1992. *See* App. 56-57; *see also* Buford's Supplemental Appendix in the United States Court of Appeals for the Seventh Circuit

(7th Cir. Supp. App.) 132, 151.[1] The police arrested her for robbing a gas station at gunpoint earlier that day. App. 56. Searching her home, police officers found cocaine, a gun, cash, and other evidence. App. 56. Petitioner then confessed to several robberies and to selling cocaine. 7th Cir. Supp. App. 151-52, 132.

On January 27, 1992, the Milwaukee County District Attorney's office filed two separate criminal complaints, docketed sequentially as F-920368 and F-920369. 7th Cir. Supp. App. 132-33, 150-52. The former case charged five armed robberies, the first on March 18, 1990 and the last on January 23, 1992. 7th Cir. Supp. App. 150-54.

The latter case charged a single count of possessing cocaine with intent to deliver on January 23, 1992. An assistant district attorney assigned only to drug cases filed that complaint and pursuant to local statutory and administrative scheme, it went to "drug court." 7th Cir. Supp. App. 175. That prosecutor later explained, at Petitioner's joint sentencing on both cases, that, "As to the drug charge, mine was done separately because we have a drug court. . . . " 7th Cir. Supp. App. 175.

So initially, the armed robbery case went to Judge Wedemeyer's branch, and the drug case to Judge Geske's. 7th Cir. Supp. App. 137, 158-59.

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[1] The Supplemental Appendix in the Seventh Circuit is lengthy and contains much handwritten, stamped, or nearly illegible material that could not be reproduced for the Joint Appendix. For the Court's convenience, then, Petitioner cites directly to the Supplemental Appendix filed in the Seventh Circuit.

With the exception of one robbery that she persuaded the prosecutor she did not commit, 7th Cir. Supp. App. 164, Petitioner later pled guilty to all charges. She pled guilty on two different days, but now in the same branch of the state court, Judge Geske's. *See* 7th Cir. Supp. App. 140-49, 163-70, 138, 159 (state court transcripts and docket entries on March 20, 1992 and April 20, 1992 reflecting both guilty pleas in Judge Geske's branch).[2] The same law firm represented her in both cases. 7th Cir. Supp. App. 141, 164.

The state court record suggests why the guilty pleas came in the same branch,[3] after the cases started in two. Between Petitioner's guilty plea in the drug case and her guilty pleas in the armed robbery case, her lawyer wrote to Judge Geske's deputy clerk, confirming a telephone conversation:

> As you may recall, during the entry of the plea on the drug case, case number F-920369, Judge

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[2] In conflict with the docket sheets, the second guilty plea transcript shows that Judge DiMotto, the original judge in neither case, presided during Petitioner's guilty plea in the armed robbery case. 7th Cir. Supp. App. 163. Counsel shares the assumption of Petitioner's first lawyer that Judge DiMotto handled Judge Geske's calendar that day, for reasons now lost. *See* Petition for Writ of Certiorari, at 8 n.3 (April 10, 2000). In all events, though, the pleas occurred in the same branch.

[3] The Seventh Circuit's opinion mistakenly implied that the guilty pleas occurred before the different judges originally assigned. App. 57; *United States v. Buford*, 201 F.3d 937, 939 (7th Cir. 2000). At a minimum, the docket sheets demonstrate that the guilty pleas occurred in only one branch of the circuit court. Further, for all the state court record shows, Judge DiMotto played no role in either case at any other time.

> Geske "volunteered" to have the Armed Robbery charges consolidated into her court for the entry of a plea and sentencing. My client, the District Attorney and myself [sic] would like to take Judge Geske up on her offer.

7th Cir. Supp. App. 162. The letter went on to set out the anticipated guilty plea arrangements, the parties' intentions for a presentence report, and the agreed sentencing date. 7th Cir. Supp. App. 162. It listed copies to both assistant district attorneys. 7th Cir. Supp. App. 162.

During Petitioner's subsequent guilty pleas on the armed robbery case, again in Judge Geske's branch, her lawyer asked that the presentence report in the drug case apply to the armed robbery case as well and also asked for sentencing on the same date as the drug case. 7th Cir. Supp. App. 165. The prosecutor seemed to agree. 7th Cir. Supp. App. 165.

Judge Geske in fact conducted a single sentencing hearing on May 21, 1992 that addressed all charges. 7th Cir. Supp. App. 171-94. Both assistant district attorneys appeared and argued for the state.

Judge Geske imposed entirely concurrent sentences: twelve years in prison on two of the armed robberies, and six years on the drug count. 7th Cir. Supp. App. 189-91. She withheld sentence on the remaining two armed robberies and placed Petitioner on concurrent fifteen-year terms of probation. 7th Cir. Supp. App. 190. Judge Geske gave Petitioner identical credit for pretrial incarceration on both cases. 7th Cir. Supp. App. 189, 191. The judge commented on the armed robberies that "it's pretty clear

that they were all motivated by your drug addiction which again is no excuse." 7th Cir. Supp. App. 182.

That statement echoed the armed robbery prosecutor's observation that, "Looking at the [probation] agent's impressions, the attached letter, it is clear that the defendant has a problem with drugs and other substances. I think the community's interest in being protected from her when she has taken up a weapon to support her habit is a strong one. . . . " 7th Cir. Supp. App. 174. The drug prosecutor said that because the drug violation "was done independent of the armed robberies, I am not taking any position how that should impact relative to the armed robbery counts." 7th Cir. Supp. App. 175.

Judge Geske entered two separate judgments of conviction, consistent clerically with the two separate case numbers. 7th Cir. Supp. App. 135, 155-56. The drug case judgment referred expressly to the armed robbery case in imposing the concurrent six-year sentence. 7th Cir. Supp. App. 135. Neither docket sheets nor judgments, though, reflected any formal order of consolidation. Only the last sheet of the docket in case number F-920369 referred to documents filed in the other case. 7th Cir. Supp. App. 139.

3. In the federal case, after reviewing Petitioner's objections and the state court record, the district judge concluded that the 1992 armed robbery and drug cases were not related. App. 20-22, 24-26. The judge commented that he might be missing something, but that on the factual record, "I don't even think this is a close case, to be quite candid." App. 23.

4. In contrast, the Seventh Circuit wrote, "Because elements of Buford's situation support either characterization [functional consolidation or no], the standard of appellate review may be dispositive." App. 59; *United States v. Buford*, 201 F.3d 937, 940 (7th Cir. 2000). If reviewed de novo, the Seventh Circuit went on to note, "this appeal could come out either way." App. 59; 201 F.3d at 940. After assessing conflicting decisions within the circuit and the split among other circuits, the unanimous panel, through Judge Easterbrook, adopted a clear-error standard of review. App. 59-62; 201 F.3d at 940-41.

Because it ruled that the district judge did not commit clear error in describing the joint sentencing as a matter of administrative convenience rather than a consolidation for sentencing, the court of appeals affirmed. App. 62-63; 201 F.3d at 941.

5. Petitioner asked this Court to review her case. On September 26, 2000, the Court granted her petition for a writ of certiorari.

SUMMARY OF ARGUMENT

1. Over the last fifteen years or more, this Court has taken a practical, ad hoc approach to assigning standards of review for mixed questions of law and fact. The Court asks which actor, district court or appellate, is suited best to decide the mixed issue at stake. De novo review usually governs when the issue does not turn on credibility assessments; when relevant legal principles acquire meaning only through application to particular facts;

when deferential review would lead to intolerably inconsistent results; when appellate courts should maintain especially close control of the legal principles; or when a defined set of rules would aid actors whom the legal standards affect. Several of those factors appear here, while those that lead to deferential review do not.

2. Here, the Seventh Circuit misunderstood this Court's teaching. It reduced a mixed question of law and fact to a pure question of fact, and then relied too heavily on cases arising under Fed. R. Civ. P. 52(a). The Seventh Circuit overlooked the distinction between historical facts and ultimate conclusions. That court also read *Koon v. United States*, 518 U.S. 81 (1996), with unsupported breadth, failing to acknowledge that relatedness and consolidation of prior convictions are narrow questions turning on documents and interpretation of legal terms, not on credibility or traditional discretion. Finally, it made an argument for ending appeals of right altogether, but not a useful argument for deciding the proper standards of review on such appeals.

3. This Court should direct de novo review of the relatedness or consolidation of prior convictions. These mixed questions depend on documents, not on demeanor, and invoke an appellate court's strengths. Textual interpretation matters much here. Further, the determination at issue is akin to discerning foreign law or state law in diversity cases, issues that appellate courts give independent review. De novo review also will serve Congress's goal of uniformity in federal sentencing. In the end, it will advance the interests of federalism by removing state

procedure from substantive federal sentencing, and making clearer to state courts how federal courts later will view their actions.

ARGUMENT

Paula Buford relies on consolidation to establish that her prior state convictions were "related" under § 4A1.2(a)(2) of the Sentencing Guidelines. Most of her prior crimes did not occur on the same occasion, and they did not necessarily form a "single common scheme or plan." U.S. SENTENCING GUIDELINES MANUAL § 4A1.2, cmt. n.3. Consolidation "for trial or sentencing" makes them related for purposes of that guideline, Petitioner contends. *Id.*

Relatedness in general, and consolidation in specific, presents a "classic mixed issue" of law and fact, as the court of appeals admitted. *Buford*, 201 F.3d at 941. A court must apply a legal standard, set out in the guideline and its application notes,[4] to classify historical facts, namely what happened in another crime and another court that led to a prior conviction.

Several controversies in recent years have prompted this Court to determine the standard of review for various mixed questions of law and fact. Petitioner begins with a survey of those decisions, covering the last fifteen years. She then assesses the decision of the United States

[4] The application notes bind courts if consistent with constitutional provisions, statutes, and the Guideline itself. *Stinson v. United States*, 508 U.S. 36, 38 (1993).

Court of Appeals for the Seventh Circuit in this case, finding that it does not hew to this Court's teaching. Finally, she argues that de novo review of this mixed question best allocates judicial roles and time in the tiered federal courts.

I. OVERVIEW: THE COURT'S MIXED QUESTION STANDARD OF REVIEW JURISPRUDENCE SINCE 1985.

Over the last fifteen years,[5] this Court has rendered a series of decisions on the proper standards of review for mixed questions of fact and law. The Court has identified factors that counsel de novo review, and others that suggest deferential review. These cases provide the analytical framework for the question here.

A. De Novo Review.

De novo review usually follows in these circumstances: When the decision does not hinge on credibility

[5] Petitioner selected a starting point that she thinks reasonable, given page limits. Even so, it excludes by one year the decision in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), which explored the related idea of constitutional fact and divided the Court over describing the question in dispute. Petitioner also sets aside *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), which held that discriminatory intent in a Title VII claim is a pure question of fact subject to clear error review under Fed. R. Civ. P. 52(a). The Court may note that the specific topic of appellate review of mixed questions of law and fact interested scholars decades before 1985. *See, e.g.*, Francis A. Bohler, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111 (1924).

determinations; when the relevant legal principle acquires meaning only through application to particular facts; when deferential review would lead to inconsistent results; when there is a particular need for appellate courts to maintain control of and to clarify legal principles; or when there is a strong need to provide a defined set of rules for actors whom the legal standards affect. These factors apply to deciding if prior convictions were "related" or "consolidated" for purposes of U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(a)(2).

1. Mixed issues that do not turn on credibility determinations usually warrant de novo review. For example, in *Miller v. Fenton*, 474 U.S. 104 (1985), the Court considered whether a state court finding of a confession's voluntariness commands a presumption of correctness in a federal habeas proceeding. Under 28 U.S.C. § 2254(d), as current then, on collateral review federal courts presumed correct a state court's findings of fact unless the record as a whole left the factual conclusions unsupported. This Court held, though, that the ultimate question of voluntariness is legal and deserves independent federal determination. *Id.* at 112.

The *Miller* Court addressed practical considerations of independent federal review. Because credibility findings at last do not resolve the issue, a state court judge occupies no better position than a federal judge from which to gauge voluntariness. *See id.* at 116-17. *Miller v. Fenton* acknowledged that underlying facts, such as police tactics, enjoy a presumption of correctness. Yet voluntariness historically is a legal issue. In the end, the voluntariness inquiry asks whether the techniques for

extracting a confession comported with a "system that presumes innocence and assures that a conviction will not be secured by inquisitorial means." *Id.* at 115.

Likewise, in *Thompson v. Keohane*, 516 U.S. 99 (1995), also concerning the § 2254(d) presumption of correctness, the Court held that a state court determination whether a suspect was in "custody," and entitled to advice of rights under *Miranda*, is a mixed question of fact and law subject to de novo federal review. 516 U.S. at 106. The Court described two inquiries that trial judges must make in assessing custodial status: First, what were the circumstances surrounding the investigation; and second, given the circumstances, would a reasonable person have felt free to leave?

The first inquiry, of course, is factual and the trial court's findings there deserve a presumption of correctness. *Id.* at 112. The second inquiry, however, is a mixed question on which the trial court claims no advantage over the reviewing court. *Id.* at 112-13. Considering that custodial status usually does not turn on credibility determinations, and that trial courts have no first-person perspective on whether a defendant was in custody, this Court found that practical considerations do not require deferential review. *Id.* at 113-14.

Similarly, because credibility determinations do not resolve whether a set of facts constitutes probable cause or reasonable suspicion, in *Ornelas v. United States*, 517 U.S. 690 (1996), the Court ruled that a district court's approval of a warrantless search under the Fourth Amendment merits de novo review. As in *Thompson v.*

Keohane, the Court prescribed a dual inquiry into reasonable suspicion and probable cause. Initially, a trial court must determine the facts underlying the stop or search – a strictly factual inquiry. Then it must assess whether those facts constituted reasonable suspicion or probable cause for an objectively reasonable police officer – a mixed question of fact and law. *Id.* at 696.

Two years later, in *United States v. Bajakajian*, 524 U.S. 321, 336 (1998), the Court declared de novo review for a district court's ruling that a forfeiture offends the Eighth Amendment's Excessive Fines Clause. The Court saw that as a mixed question. Applying the dual-inquiry format of *Thompson* and *Ornelas*, the Court said that an appellate court must accept a district court's factual findings unless clearly erroneous. However, deciding whether a fine is excessive requires applying a constitutional standard to those facts, a de novo exercise that does not entail credibility determinations. *Bajakajian*, 524 U.S. at 336 n.10.

Most recently, in *Lilly v. Virginia*, 527 U.S. 116, 136-37 (1999), a plurality (Justices Breyer, Ginsburg, Souter and Stevens) agreed that a state trial court's evidentiary decision to admit a non-testifying accomplice's statement inculpating the accused, over a Confrontation Clause objection, warrants de novo review.[6] The plurality

[6] Chief Justice Rehnquist, with Justices O'Connor and Kennedy joining, concluded that federal courts should review deferentially the state trial court's decision to admit a non-testifying accomplice's statement. Although the Chief Justice conceded for sake of argument that the issue may be a mixed question of fact and law, he wrote that the mix weighs heavily on the fact side and that the trial court is best situated to decide whether a particular statement is so reliable that cross-examination would add little to its trustworthiness. *Lilly*, 527 U.S. at 148-49 (Rehnquist, C.J., concurring in the judgment).

favored again a two-step analysis, under which a federal court would review the state trial court's findings of historical fact for clear error but decide de novo whether proffered guarantees of trustworthiness satisfy the Confrontation Clause. *Id.* at 137. De novo review is appropriate, the plurality argued, because a Sixth Amendment admissibility determination does not turn on the declarant's in-court demeanor, or on any other factor uniquely suited to the trial court. *Id.*

Determining whether cases are "related" for purposes of U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(a)(2), like analyzing whether a confession is voluntary or deciding whether police had probable cause to conduct a warrantless search, does not require a credibility determination. An appellate court first should review the district court's historical fact findings for clear error in this setting. But the district court's second decision whether facts make the cases "related" under the Sentencing Guidelines turns not on credibility and lends itself to de novo review.

2. Next, de novo review makes good sense when the relevant legal principle acquires meaning only through application to particular facts. For example, reasonable suspicion and probable cause do not reduce easily to legal rules, the Court observed in *Ornelas*, but instead gain their meaning from the particular settings in which courts explain those standards. *Ornelas*, 517 U.S. at 696. The concepts of custodial status, excessive fines, and

voluntariness of confessions likewise acquire meaning only by application to particular facts.

Similarly, the term "related cases" for purposes of § 4A1.2(a)(2) is not readily shaped in the abstract into sharp definition. Must cases be consolidated formally to be "related?" Or, may cases be "related" through functional consolidation? If the latter, what constitutes functional consolidation? The Sentencing Guidelines do not answer these questions. Rather, the answers come incrementally by construing and then applying the term "related cases" to changing facts. That mixed question invites de novo review.

3. De novo review also applies when deferential review would lead to intolerably inconsistent results. The Court raised that concern in *Ornelas*, where it warned that deferential review of reasonable suspicion and probable cause would lead to uneven constitutional standards throughout the nation:

> A policy of sweeping deference would permit, "[i]n the absence of any significant difference in the facts," "the Fourth Amendment's incidence [to] tur[n] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause." [Citation omitted]. Such varied results would be inconsistent with the idea of a unitary system of law.

Id. at 697 (quoting *Brinegar v. United States*, 338 U.S. 160, 171 (1949)).

Consistent results also matter when federal courts apply state law, for this Court cemented that goal in the very foundations of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64

(1938). Not surprisingly, then, in *Salve Regina College v. Russell*, 499 U.S. 225 (1991), this Court held that, in diversity cases, federal appellate courts will review de novo district court determinations of state law. The Court noted the appellate courts' inherent advantage in confronting legal issues, given the time those courts allow for "reasoned reflection" and the "collaborative judicial process that promotes decisional accuracy." *Salve Regina College*, 499 U.S. at 231.

Further, *Salve Regina College* rejected the argument that a district judge's proximity trumps in determining the law of the state in which the district judge sits. The "bases of state law are as equally communicable to the appellate judges as they are to the district judge," this Court reasoned. *Id.* at 238.

This concern for consistent results applies equally to the Sentencing Guidelines, given their preeminent purpose of uniform sentencing for similarly placed defendants. *Koon v. United States*, 518 U.S. 81, 92, 113 (1996); *id.* at 119 (Breyer, J., concurring in part, dissenting in part); *see generally Mistretta v. United States*, 488 U.S. 361, 365-67 (1989). Whether cases are "related," therefore, should not depend on the varying textual interpretations of federal district judges. Historical facts will vary, but the meaning of the terms applied to them should not.

4. Similarly, de novo review is appropriate when appellate courts have a strong need to maintain control of and to clarify legal principles. The *Lilly* plurality, with respect to the Sixth Amendment's Confrontation Clause, wrote that independent review is required to " 'maintain control of, and to clarify, the legal principles' governing

the factual circumstances necessary to satisfy the protections of the Bill of Rights." 527 U.S. at 136 (quoting *Ornelas*, 517 U.S. at 697).

Independent appellate review also would serve to clarify the principles governing the Sentencing Guidelines. As case law develops, and the appellate courts offer clear explanations and examples of what the term "related" means under § 4A1.2, district judges will rely on a better-defined standard.

5. Finally, de novo review is proper when courts should provide a defined set of rules for the actors affected by the legal standards. In *Thompson v. Keohane*, for example, the Court reasoned that because determining whether a suspect was in "custody" could have universal application, independent review of custodial status would guide police, unify precedent and stabilize the law. *Thompson v. Keohane*, 516 U.S. at 114-15. Comparably in *Ornelas*, the Court said that de novo review of the district court's conclusions regarding "reasonable suspicion" and "probable cause" would unify precedent and provide police with a defined set of rules. *Ornelas*, 517 U.S. at 697.

Here, too, the actors whom the Sentencing Guidelines most affect – defendants, district judges, and lawyers on both sides – would benefit from a defined set of standards governing the Sentencing Guidelines. The appellate courts define standards best.

B. Deferential Review.

1. In contrast, mixed question cases in which this Court adopted a deferential standard of review have

concerned circumstances missing here, such as elusive, fact-intensive inquiries and credibility determinations. For example, in *Pierce v. Underwood*, 487 U.S. 552, 559 (1988), the Court held that a district court's views on whether the government's position in a case was "substantially justified," and whether the prevailing party wins attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), face review only for abuse of discretion.

As in cases where the Court found de novo review proper, *Pierce v. Underwood* asked a practical question: Does one judicial actor hold a better place than another to decide the issue? The Court took note that factors bearing importantly on justification for the government's position, such as the quality of evidence, may be known only to the district court through settlement conferences and other pretrial activities. 487 U.S. at 559.

The *Pierce v. Underwood* approach focuses on the practical qualities of the mixed question as a whole, not on distinguishing its factual aspect from its legal aspect. That approach mostly avoids the "notoriously difficult" definitional problem of separating fact questions from law questions. Ellen E. Sward, *Appellate Review of Judicial Fact-Finding*, 40 U. KAN. L. REV. 1, 11 (1991).

Independent appellate review of the government's position also would be unusually cumbersome, the *Pierce v. Underwood* Court observed, because the appeals court would have to review the entire record to determine whether opposing the merits decision was substantially justified, in addition to determining whether the district court's merits ruling was right. 487 U.S. at 560. The Court

reasoned finally that de novo review is not appropriate because asking whether the government's position was substantially justified is "a multifarious and novel question, little susceptible, for the time being at least, of useful generalization." *Id.* at 562.

The Court undertook a similar analysis in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990), which held that a sanction decision under Fed. R. Civ. P. 11 merits review for abuse of discretion. Deciding whether sanctions are appropriate under Rule 11 is a fact-intensive and case-specific undertaking, often requiring credibility determinations. *Cooter & Gell*, 496 U.S. at 401-02. Consequently, the district court occupies a better seat from which to decide a Rule 11 motion than does the court of appeals.

Further, as in *Pierce v. Underwood*, an appeals court reviewing de novo would have to determine whether an attorney's theory appeared plausible. That either would fail to produce law-clarifying benefits if the law already was clear or would establish the law in a peculiarly indirect manner if it was unclear. *Id.* at 403-04. The Court appreciated that, while district court definitions of conduct violating Rule 11 may vary, some variation is inevitable in applying a standard based on reasonableness. *Id.* at 404-05.

2. In *Koon v. United States*, the Court held that a sentencing judge's ultimate decision to depart either up or down from the Guideline range should be reviewed for abuse of discretion. Congress intended district courts to retain much of their traditional sentencing discretion, although the Court acknowledged that appellate review

should not be an "empty exercise." *Koon*, 518 U.S. at 98. For that reason, an appeals court must give due deference to the district court's application of the Guidelines to the facts, *id.* at 98 (citing 18 U.S.C. § 3742(e)(4)), but must review independently questions of law that arise when determining whether to depart from the Guidelines. *Id.* at 100.

Still, the Court decided that the abuse-of-discretion standard includes ensuring that mistaken legal conclusions did not guide the sentencing judge's discretion. *Id.* at 100. *Koon* said the district court can decide better whether a departure is appropriate, given the heavily factual nature of that inquiry. *Id.* at 99.

Additionally, the Court noted, the district court's departure decision involves consideration of unique factors not susceptible to generalization. Therefore, de novo review would not likely establish clear guidelines for lower courts. *Id.*

3. In summary, the Court in recent years often has considered the appropriate standard of review for mixed questions of law and fact. The federal courts of appeal frequently have disagreed on the proper standard of review for a particular mixed question, and this Court has provided the final answer. Whether the Seventh Circuit drew properly from earlier cases is another question still.

II. THE SEVENTH CIRCUIT INCORRECTLY APPLIED THIS COURT'S DECISIONS.

As the Seventh Circuit acknowledged, the standard of review for a district court's ruling on the relatedness of prior convictions has divided the courts of appeal. App. 59-60; *Buford*, 201 F.3d at 941.[7]

Before this case, the appellate decisions addressing the standard of review in this setting provided almost no helpful reasoning. The courts that adopted a de novo

[7] By the Seventh Circuit's tally, App. 60; *Buford*, 201 F.3d at 941, six circuits review relatedness deferentially. *United States v. Mapp*, 170 F.3d 328, 338 (2d Cir.), *cert. denied*, 120 S. Ct. 239 (1999); *United States v. Huggins*, 191 F.3d 532, 539 (4th Cir. 1999), *cert. denied*, 120 S. Ct. 1968 (2000); *United States v. Irons*, 196 F.3d 634, 640 (6th Cir. 1999); *United States v. Bartolotta*, 153 F.3d 875, 879 (8th Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999); *United States v. Wiseman*, 172 F.3d 1196, 1219 (10th Cir.), *cert. denied*, 120 S. Ct. 211 (1999); and *United States v. Mullens*, 65 F.3d 1560, 1565-66 (11th Cir. 1995), *cert. denied*, 517 U.S. 1112 (1996). Three others review relatedness de novo, again as *Buford* counted them. *United States v. Correa*, 114 F.3d 314, 317 (1st Cir.), *cert. denied*, 522 U.S. 927 (1997); *United States v. Huskey*, 137 F.3d 283, 285 (5th Cir. 1998); and *United States v. Allen*, 153 F.3d 1037, 1045 (9th Cir. 1998), *cert. denied*, 525 U.S. 1170 (1999).

After *Buford*, the Third Circuit also weighed in on the side of deferential review. *United States v. Beckett*, 208 F.3d 140, 147-48 (3d Cir. 2000). That would make the split now 8 – 3.

However, the Seventh Circuit arguably misread *Wiseman*. The Tenth Circuit there held that, "The district court's determination of whether offenses were related is a factual determination which we review only for clear error, but we review the application of the sentencing guidelines, including the meaning of the term 'related,' de novo." *Wiseman*, 172 F.3d at 1219.

standard offered little analysis; so too the courts that adopted a deferential standard.

By comparison, the Seventh Circuit fairly explained its view. While colorful, though, the Seventh Circuit's opinion did not reflect the hues of this Court's standard-of-review decisions in recent years.[8] This Court should reverse.

A. Seventh Circuit's Focus.

1. Initially, the Seventh Circuit hedged in describing the nature of the issue. The court below first wrote that this was a "classic mixed issue," App. 60; *Buford*, 201 F.3d at 941, and that relatedness and consolidation "are not pure questions of law." *Id.* But the court later held that

[8] At least one academic commentator would disagree. Professor Evan Tsen Lee has praised the Seventh Circuit in particular for leaning toward deferential review of mixed questions. Evan Tsen Lee, *Principled Decision Making and the Proper Role of Federal Appellate Courts: The Mixed Questions Conflict*, 64 S. CAL. L. REV. 235, 237, 247-56 (1991).

But Professor Lee in the end makes a circular argument for deferential review of mixed questions "unless, in a particular case, review of such findings would produce meaningful precedent." Lee, *supra*, at 285. Once a court of appeals resolves to review de novo, its independence will allow meaningful precedent in almost any case, especially if it reverses (which Professor Lee considers important). So the meaningful precedent criterion does not help in deciding what standard of review to employ at the outset. It also contradicts the systemic principle that happenstance of individual consequences in one case does not, and should not, determine a standard of review for the many cases; see discussion *infra*, at 30-32.

"whether cases have been 'consolidated' for trial or sentencing is a matter of fact." *Id.* at 942.

This shifting description may explain why the *Buford* court clung to the terms "clearly erroneous," *id.* at 940, and "clear error," *id.* at 942, in the face of this Court's explanation in *Ornelas* that the preferable term for deferential review of mixed questions is "abuse of discretion." 517 U.S. at 694 n.3. *Ornelas*, which also arose from the Seventh Circuit, noted that "clear error" is a term of art derived from Fed. R. Civ. P. 52(a) and applying to questions of fact. The Seventh Circuit nowhere mentioned – or heeded – *Ornelas*.

2. Instead, the court of appeals relied principally on this Court's standard of review decisions in civil cases under Rule 52(a). *See Buford*, 201 F.3d at 941 (citing *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); and *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986)). That rule draws two categories, findings of fact and conclusions of law, and instructs a reviewing court not to set aside fact findings "unless clearly erroneous." Fed. R. Civ. P. 52(a).

Although 18 U.S.C. § 3742(e) also sets a clear-error standard for fact findings in this context, Petitioner does not seek de novo review of pure facts. Surely, too, the "due deference" standard in § 3742(e) does not compel deferential review for mixed questions, like relatedness and consolidation; appellate courts owe district courts only the deference "due" on a given issue. *Cf. Koon*, 518 U.S. at 98 (deference due depends on nature of question). Petitioner asks de novo review only of a mixed question, specifically the applied meaning of "related" and the

subsidiary term "consolidated." A district court commands little, if any, deference on this interpretive task.

3. In this regard, the court of appeals overlooked *Ornelas* and even some of its own mixed question decisions[9] that teach the importance of distinguishing historical facts, reviewed deferentially, from the ultimate conclusion on a mixed question, which may (or may not) merit de novo review. *Ornelas*, 517 U.S. at 696-97, 699; *id.* at 701 (Scalia, J., dissenting); *Thompson v. Keohane*, 516 U.S. at 112-13.

B. The Proper Role of *Koon*.

1. While the court of appeals did not pass by *Koon v. United States* as it did *Ornelas*, it read *Koon* quite broadly. Again, *Koon* held that appellate courts should not review departure decisions de novo, but rather should ask whether the sentencing court abused its discretion. *Koon*, 518 U.S. at 91. That ruling pivoted on the standards for departure, which require that "certain aspects of the case must be found unusual enough for it to fall outside the

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[9] *E.g., United States v. D.F.*, 115 F.3d 413, 415-19 (7th Cir. 1997), an opinion after remand for reconsideration in light of *Ornelas*. *United States v. D.F.*, 63 F.3d 671 (7th Cir. 1995), *vacated and remanded*, 517 U.S. 1231 (1996). In the second *D.F.* opinion, the Seventh Circuit abandoned its previous deferential standard of review for the voluntariness of confessions, and distinguished carefully between historical facts and the final conclusion of involuntariness. *See also United States v. Frederick*, 182 F.3d 496, 502-04 (7th Cir. 1999) (Diane P. Wood, J., concurring) (objecting to suggestion that most mixed questions receive deferential review; discussing *Ornelas* and other decisions).

heartland of cases in the Guideline . . . [T]he district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing." *Id.* at 98. "[A] district court's departure decision," this Court explained further, "involves 'the consideration of unique factors that are "little susceptible . . . of useful generalization." '" *Id.* at 99 (quoting *Cooter & Gell*, 496 U.S. at 404).

The Seventh Circuit started with *Koon's* correct thesis that departures demand a trial judge's traditional sentencing discretion in weighing all factual nuances of a defendant and her crime. But it leapt a great distance to the proposition that therefore, "Questions concerning application of the Guidelines generally are reviewed deferentially, . . . unless the district court makes an identifiable legal mistake." *Buford*, 201 F.3d at 942.

That leap was too long. True, the abuse of discretion standard allows an appellate court to correct mistakes of law, *Koon*, 518 U.S. at 100, but it hardly follows necessarily that all legal interpretations of Guidelines terms or mixed questions arising under the Guidelines therefore receive only deferential review. Justice Breyer, while chief judge of the First Circuit, anticipated and could have prevented the Seventh Circuit's mistake:

> Plenary review is also appropriate where the appellate court, in deciding whether the allegedly special circumstances are of a "kind" that permits departure, will have to perform the "quintessentially legal" function [citation omitted] of interpreting a set of words, those of an individual guideline, in light of their intention

> or purpose, in order to identify the nature of the guideline's "heartland". . . .

United States v. Rivera, 994 F.2d 942, 951 (1st Cir. 1993) (Breyer, C.J.). Because "the district court has no special competence in performing this kind of classic textual analysis," *Rivera*, 994 F.2d at 951, a court of appeals owes no special deference to the lower court on that task. *See also United States v. Doe*, 18 F.3d 41, 43-44 (1st Cir. 1994) (Breyer, C.J.).

2. As Petitioner has noted, much of the task here is legal. The district court had to decide what the term "related" meant, U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(a)(2), and also had to interpret the term "consolidated" in the Guideline's third application note. Those jobs demanded none of the discretion necessary in departure decisions, or even in fashioning a sentence in the end. A district court had "no comparative expertise in resolving the 'quintessentially legal' issue . . . ," *Doe*, 18 F.3d at 44 (quoting *Rivera*), that was a predicate of Petitioner's sentence.

Moreover, determinations of what prior convictions are related, or whether another court consolidated earlier proceedings for trial or sentencing, typically do not depend on credibility evaluations or even on burdens of persuasion. To the contrary, these determinations hinge on state court (or occasionally federal court) records in the usual case. Whether the pertinent documents are transcripts, pleadings, docket entries, or other materials, they involve an assessment of paper, not people. District judges have no institutional advantage in that task, either.

In short, departures necessarily turn on "exceptional degree" or fulsome facts lying outside an indistinct "heartland." *Koon*, 518 U.S. at 96. Interpretation and application of specific Guideline terms, using paper-and-ink court records, do not. Whether to depart is a question well removed from whether prior cases were related or consolidated. So it is true that a court of appeals "shall give due deference to the district court's application of the guidelines to the facts," 18 U.S.C. § 3742(e), but equally true that, "The deference that is due depends on the nature of the question presented." *Koon*, 518 U.S. at 98.

C. Why Appeals At All?

1. The Seventh Circuit's concluding argument for deferential review attempted to prove too much. "How best to understand the events in the Wisconsin courts in spring 1992 has no significance beyond these parties," that court posited. "Someone has to select a characterization of complex facts, and the best candidate for that role is the district judge." App. 62; *Buford*, 201 F.3d at 942.

For sake of argument, Petitioner accepts the insignificance of the district court outcome here to those not parties. Yet closely viewed, the dispositive issue in most appeals has no significance beyond the parties and those closely allied with them. The Seventh Circuit's observation is not so much an argument for deferential review, then, as it is an argument for not erecting an error-correcting appellate structure, available of right, at all.

This Court, with a largely discretionary jurisdiction exercised in cases of surpassingly broad importance, would suffice if the Seventh Circuit's argument were persuasive.

But it is not persuasive. Even apart from the truism that criminal cases address societal, not individual, harms, the organizing principle of a tiered federal judiciary is not just the sweep of a particular lawsuit's significance to a democratic society. It is instead the particularly sweeping significance in a democratic society of resolving lawsuits justly. We make appeals available of right not because any one error in a trial court makes a great difference to many, but because many small errors in trial courts, uncorrected, would make a great difference to all. They would undermine the government's perceived ability to govern justly, and thus its very legitimacy to govern in a democracy at all.

2. In deciding standards of review, this Court never has focused on the reach or personal significance of a particular case's outcome, although it raised that possibility in *Pierce v. Underwood*, 487 U.S. at 563. The Court surely has considered whether facts driving an outcome are fleeting, unlikely to recur, or resistant to general description. *See, e.g., Cooter & Gell*, 496 U.S. at 401-05; *Pierce*, 487 U.S. at 562. But that is different. The peculiarities of a specific type of factual inquiry or of the sources from which judges must draw mixed conclusions rightly may affect assignment of responsibilities within the ranks of federal courts, as this Court understands. The mere peculiarities of the parties present or of the outcome's impact rightly cannot.

3. Writing in a different context, Professor Gewirtz captured the rightful role of appellate courts:

> There are three main functions that a judicial opinion serves: first, to give guidance to other judges, lawyers, and the general public about what the law is; second, to discipline the judge's deliberative process with a public account of the decision, thus deterring error and corruption; and, third, to persuade the court's audiences that the court did the right thing.

Paul Gewirtz, *On 'I Know It When I See It,'* 105 YALE L.J. 1023, 1039 (1996).

Judge Kozinski approached the same point when he observed, "Judges have traditionally held a special place in the public's mind as arbiters of our disputes and protectors of our individual freedoms. But judges can only do that job if they are trusted." Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, 26 LOY. L.A. L. REV. 993, 998 (1993). Petitioner would not discount the third of Gewirtz's functions of an appellate decision, or the importance even in the small case of maintaining public trust in judging and in judges.

4. The Seventh Circuit should have focused, then, on the best judicial actor to assure uniformity and accuracy of outcomes in like cases and to provide guidance to other judges and future litigants, as this Court has. Focusing instead on the stakes to these particular litigants helped little in assigning roles within the federal courts. Petitioner recasts her focus now.

III. DE NOVO REVIEW OF THIS MIXED QUESTION BEST ASSIGNS JUDICIAL DUTIES IN THE FEDERAL COURTS.

Past decisions point generally toward the appropriate standard for a given mixed question, rather than predicting the standard specifically. Those earlier decisions suggest that application of the Sentencing Guidelines' doctrine of "related cases" in § 4A1.2(a)(2) falls on the side of de novo review.

A. Synopsis.

Generally, the standard of review on a mixed question turns on which judicial actor is best suited to resolve the issue. If the district court has the advantage because of proximity to witnesses, to litigants, or to relevant events themselves, then the appellate court should review for clear error. *See, e.g., Pierce v. Underwood*, 487 U.S. at 559-60. If, on the other hand, the appellate court enjoys an institutional advantage because of its time, focus, role in forming and clarifying the law, or collaborative practice of hearing cases in panels, then it should review de novo. *See id.* at 559-60; *Salve Regina College*, 499 U.S. at 231-32; *Miller v. Fenton*, 474 U.S. at 114-17; *see also* Sward, *supra*, at 13-16 (competence, fairness, and efficiency the main reasons for de novo review of legal questions).

B. Analysis.

1. The task of determining criminal history for Sentencing Guidelines purposes, and the relatedness of prior convictions, offers no advantage to the trial court. The

events at stake – prior crimes and prosecutions – take place earlier and elsewhere, beyond the district court's observation. The determination of relatedness depends not on witnesses or their credibility, but on documents.[10] Those documents usually come from the files of a court, and only their meaning (not their authenticity) ordinarily is in question.

This Court has no reason to assume that the court documents will be local to the district court, or even from a familiar state court; a defendant's prior convictions may arise anywhere. To the extent that such documents or a presentence investigation report bear critically on the decision, they are as much available to the court of appeals as to the district court.

2. The conduct of the immediate parties before the district court also has no effect on the relatedness dispute, which is not an issue enmeshed in supervision of litigation, such as a Rule 11 sanctions decision or an award of attorney's fees under the Equal Access to Justice Act. *See Salve Regina College*, 499 U.S. at 233.

3. Most importantly, perhaps, the task of evaluating relatedness or consolidation entails deciding what a particular Sentencing Guideline, § 4A1.2(a)(2), and its application note mean. This "quintessentially legal" task is the

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[10] Petitioner appreciates that questions of fact receive deferential review even if findings rest not on credibility determinations, but on documents or inferences. *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985). However, *Anderson* was a Rule 52(a) case explicitly concerned only with questions of fact. This case presents a decidedly mixed question.

core work of appellate courts. *See Rivera*, 994 F.2d at 951; *Doe*, 18 F.3d at 43-44.

Applied to facts, this legal exercise resembles a determination of state law in actions within a federal court's diversity jurisdiction, or a determination of foreign law – both assessments of what unfamiliar courts did or would do. In those situations, federal appellate courts review de novo, having the institutional advantage in apprehending the law of other jurisdictions by review of documents. *Salve Regina College*, 499 U.S. at 231 (de novo review of state law determinations); Fed. R. Civ. P. 44.1, Fed. R. Crim. P. 26.1 (district court's ruling on foreign law treated as question of law); *Carlisle Ventures, Inc. v. Banco Espanol de Credito, S.A.*, 176 F.3d 601, 604 (2d Cir. 1999) (de novo review of foreign law determination). The appellate courts have a similar duty here, too.

4. Indeed, their duty is stronger on this point. For the federal courts are not assessing the law of separate sovereigns, they are interpreting a federal sentencing guideline and its commentary. Federal text contains the terms "related" and "consolidated." There is no reason to believe that the Sentencing Commission intended federal courts to adopt a state law rule of decision (let alone fifty states' rules) in determining which prior convictions are related. The opposite is true. The related case provision of § 4A1.2 traces its origins to a federal source, the United States Parole Commission's salient factor score, although it differs from the Parole Commission's simpler rule. Daniel P. Bach, *Reconsidering Related Conduct*, 9 FED. SENT. REP. 198, 199-200 (1997); Peter B. Hoffman & James L. Beck, *The Origin of the Federal Criminal History Score*, 9 FED. SENT. REP. 192, 192-93 (1997).

Federal rules of decision under the United States Sentencing Guidelines serve, and preserve, the essential role of those guidelines. The overarching Congressional purpose in enacting the Sentencing Reform Act of 1984 was to promote uniformity of federal sentencing practices. *See Koon*, 518 U.S. at 97.

Only de novo review of this issue, allowing a clear federal rule to develop and persist, holds true to that purpose of uniformity. Deferential review, or a clear error standard as the court below called it, necessarily means that an appellate court lets stand conclusions that may be wrong, if not wildly so (and not wrong by reason of wholly legal misunderstanding). In other words, different district courts would be free under that standard reasonably to reach opposing conclusions about relatedness on the same documentary record, and then on those conclusions alone to impose dramatically different sentences.

Whatever its possible merits, that regime would conflict badly with the legislative goal for the Sentencing Commission and its guidelines. Sentencing of like offenders would be less uniform, for what one district judge might consider functional consolidation of prior convictions another district judge might not. Disparate effects on identically situated defendants often would follow those differing conclusions. Petitioner, who saw her sentence nearly doubled because of the district court's relatedness ruling, stands as only one example.[11]

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[11] The consequences of the outcome are not insignificant, either, if that is one criterion. To reduce the importance of the added loss of liberty to Petitioner alone, as the Seventh Circuit did, again is to promote a judicial system without appellate review of right, not to illumine the better judicial actor to make the final call within the system we have.

5. *Koon*, with its abuse-of-discretion review of departure decisions, certainly did not undercut the central importance of uniformity in federal guideline sentencing. A departure is the last decision a sentencing judge makes in the intellectual process of applying the guidelines. As a matter of structure, departures follow relevant conduct determinations, offense level calculation, grouping, and criminal history scoring.

In a real sense, the departure decision then represents the judge's ultimate call on the exactly appropriate punishment. It "embodies the traditional exercise of discretion by a sentencing court." *Koon*, 518 U.S. at 98; *see also Williams v. United States*, 503 U.S. 193, 205 (1992) ("The selection of the appropriate sentence from within the guideline range, as well as the decision to depart from the range in certain circumstances, are decisions that are left solely to the sentencing court").

In contrast, an interpretation of guideline text, like the term "related" for criminal history purposes, is at most a penultimate call. Although it often affects the eventual sentence indirectly, it resides in the field of predicate legal or mixed determinations that together culminate in the ultimate exercise of sentencing discretion.

So while the reasons for discretion reach their zenith at the moment a judge must integrate all of the factual findings, legal interpretations, and less concrete nuances that result in the final reckoning for one person, those

reasons for discretion are less compelling lower in the arc as the judge proceeds first through predicate interpretations. There is no more need for a district court's broad discretion, or an appellate court's corresponding deference, in textual interpretation under § 4A1.2 than in any other legal construction of a statute or rule. True, Petitioner speaks not of merely mathematical errors in applying the Guidelines, but of textual interpretation. Still, "the appellate court will be in as good a position to consider the question as the district court was in the first instance." *Koon*, 518 U.S. at 98. And on these issues of guideline construction, uniformity matters most.

6. Finally, two federalism concerns bear on the proper standard of review here. First, state *procedural* rules and quirks should not sway the resolution of federal prosecutions, any more than state procedure ordinarily binds federal courts sitting in diversity. *See generally Hanna v. Plumer*, 380 U.S. 460, 471-74 (1965); *Sibbach v. Wilson & Co., Inc.*, 312 U.S. 1, 9-14 (1941). There is no good reason that federal sentences for federal crimes should vary nearly two-fold, as here, solely on the differing views that district courts might take of the vagaries of local procedure or practice in clogged state courts across the country.

Depending on the size of the county, the volume of its courts, and an unimagined list of intangibles, state judicial procedures may tilt heavily to the oral and informal. That informality may follow the familiarity that comes when the same assistant prosecutors and state public defenders, or lawyers ensconced in a single courthouse, appear several times daily before the same local

judges. Especially in very busy counties, clerical procedures likewise may be irregular, unfathomable from outside, or simply inefficient. Those factors ought have no bearing on federal assessments of culpability, if federal sovereignty deserves the same respect in its proper realm as state sovereignty in its.

To preserve federal sovereignty, that the nation's district courts may act on federal law and not on the accidents of state procedure, appellate courts must claim the leading role in fixing and clarifying a federal rule on the consolidation and relatedness of earlier convictions. Left to reign, the impact of state procedural quirks would not be trivial, for federal offenders and the United States dispute the relatedness of prior convictions frequently. *See* Bach, *supra*, at 198 & n.1.

Second, the appellate courts can reduce friction with co-equal state sovereigns by making clear what federal courts will view as consolidation, and what they will not. De novo review offers better guidance in this respect to state courts as well as to federal district courts. A state judge who wants her actions understood later in federal court as she understands them will have a more reliable place to look if twelve federal circuits control the rule, not ninety-four districts. With a de novo standard, the interpretation of state court actions becomes less haphazard in federal district court.

That consistency and predictability will serve the integrity of all courts, state and federal. More, it best will persuade an appellate "court's audiences that the court did the right thing." Gewirtz, *supra*, at 1039.

CONCLUSION

Petitioner prays that the Court reverse the judgment of the United States Court of Appeals for the Seventh Circuit, remand for reconsideration under a de novo standard of review, and direct the court of appeals to proceed in a manner consistent with this Court's opinion.

Respectfully submitted,

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No. 99-9073

In the Supreme Court of the United States

PAULA L. BUFORD, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a court of appeals should apply a *de novo* or deferential standard of review to a district court's determination that a defendant's prior sentences were not "related" because they did not result from offenses that were functionally "consolidated for trial or sentencing," within the meaning of Application Note 3 to Sentencing Guidelines § 4A1.2.

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 54-63) is reported at 201 F.3d 937.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2000. The petition for a writ of certiorari was filed on April 10, 2000, and was granted on September 26, 2000. J.A. 65. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

SENTENCING GUIDELINES INVOLVED

Reprinted in an appendix to this brief (App., *infra*, 1a-3a) are the relevant provisions of 18 U.S.C. 3742(e), Sentencing Guidelines § 4A1.2, Application Note 3 to Guidelines § 4A1.2, Guidelines § 4B1.1, Guidelines § 4B1.2, and Application Note 3 to Guidelines § 4B1.2.

STATEMENT

Following a guilty plea, petitioner was convicted in the United States District Court for the Eastern District of Wisconsin on one count of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d). Petitioner was sentenced to 188 months' imprisonment, to be followed by five years' supervised release, and was ordered to pay $2,615 in restitution. J.A. 45, 46, 51. The court of appeals affirmed. J.A. 54-63.

1. On January 23, 1992, petitioner was stopped by officers of the Milwaukee, Wisconsin, police department on suspicion of having committed the armed robbery of a service station earlier that day. After petitioner was stopped, she directed the police to her residence, where the officers found cocaine. Petitioner admitted to the officers that she sold cocaine and that the cocaine found in her house belonged to her. She also admitted to the officers that she committed the armed robbery of the service station, as well as three other armed robberies during the previous two years. Pet. C.A. Supp. App. 132-133, 151-152.

On January 27, 1992, petitioner was charged with felonies in two separate criminal complaints filed in Milwaukee County Circuit Court. In Case No. F-920368, petitioner was charged with five counts of armed robbery, alleged to have occurred on March 18, 1990, May 18, 1990, December 4, 1991, December 9, 1991, and January 23, 1992. Pet. C.A. Supp. App. 150-

152. In Case No. F-920369, petitioner was charged with possession of a controlled substance (cocaine) with intent to deliver, which offense occurred on January 23, 1992. *Id.* at 132-133. The complaints were signed by different Assistant District Attorneys. *Id.* at 133, 152.

The armed robbery charges were initially assigned to Judge Ted E. Wedemeyer, Jr., of Milwaukee Circuit Court Branch 34, and the drug case was assigned to Judge Janine Geske, of Milwaukee Circuit Court Branch 23, a unit of the court that principally heard narcotics cases. C.A. Supp. App. 132-133, 137, 157, 175. The two cases initially proceeded on separate tracks. On February 11, 1992, Judge Geske scheduled the narcotics case for a jury trial on March 23, 1992. The narcotics prosecution was handled principally by Assistant District Attorney Jack Stoiber. Pet. C.A. Supp. App. 137. On March 20, 1992, at a pretrial hearing before Judge Geske, petitioner entered a guilty plea to the charge of possession of cocaine with intent to deliver. Petitioner's attorney then informed Judge Geske that the armed robbery charges pending before Judge Wedemeyer were scheduled for a possible guilty plea hearing on June 4, 1992, and asked Judge Geske to postpone sentencing until after that date. *Id.* at 147.[1] Judge Geske declined to postpone sentencing for the resolution of the armed robbery case, however, and ordered a sentencing hearing in the narcotics case on May 21, 1992. *Id.* at 148.

Meanwhile, on February 11, 1992, at a status conference in the armed robbery case, Judge Wedemeyer

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[1] The docket of the armed robbery case does not disclose that any guilty plea hearing in that case was scheduled for June 4, 1992. As explained below, petitioner pleaded guilty in the armed robbery case at a hearing held on April 20, 1992.

scheduled a jury trial for September 8, 1992. Pet. C.A. Supp. App. 158. That case was handled by Assistant District Attorneys Douglas Simpson and Michael Steinhafel. On April 20, 1992, at a hearing before Judge John DiMotto,[2] petitioner entered guilty pleas to four of the five armed robbery charges, and the fifth charge was dismissed. *Id.* at 163-170. At the hearing, petitioner's counsel told Judge DiMotto that petitioner had "another matter pending before Judge Geske" (the drug case) in which sentencing had already been scheduled, and asked the court to set the armed robbery matter over for sentencing on the same date and that the same presentence report be used for both cases. *Id.* at 165. In response, Judge DiMotto "adjourn[ed] the matter for sentencing before Judge Geske on May 21, 1992, * * * in conjunction with the sentencing on the other case [petitioner] ha[d] in Judge Geske's Court." *Id.* at 169.

On May 21, 1992, Assistant District Attorneys Simpson and Stoiber appeared before Judge Geske at

[2] The docket of the armed robbery charge states that Judge Geske of Branch 23 presided at the guilty plea hearing. Pet. C.A. Supp. App. 159. The transcript, however, indicates that Judge DiMotto of Branch 41 presided, *id.* at 163, and petitioner does not dispute that Judge DiMotto in fact presided, see Pet. Br. 7 n.2. The docket does not disclose why the case would have been transferred from Judge Wedemeyer to Judge Geske, nor why Judge DiMotto would have heard the case instead of Judge Geske on that date. A letter to Judge Geske's clerk from petitioner's counsel in the state court proceedings states that, at the guilty plea on the narcotics case, "Judge Geske 'volunteered' to have the Armed Robbery charges consolidated into her court for the entry of a plea and sentencing." Pet. C.A. Supp. App. 162. The transcript of the record of the guilty plea hearing in the narcotics case does not disclose any such statement by Judge Geske, however, and Judge Geske never entered any formal order of consolidation.

petitioner's sentencings on the armed robbery and the narcotics cases, respectively. The two Assistant District Attorneys made separate sentencing arguments. See Pet. C.A. Supp. App. 173-176. Stoiber stated to Judge Geske that, because petitioner's drug offense (which he handled) "was done independent of the armed robberies, I am not taking any position how that should impact relative to the armed robbery counts." *Id.* at 175. The court ordered separate sentences in the two cases, *id.* at 189-191, and entered separate judgments of conviction, *id.* at 135, 155-156. In the narcotics case, the court ordered petitioner's sentence to run concurrent to her sentence for armed robbery because of petitioner's honesty and her cooperation with the authorities. *Id.* at 191.

2. The instant case arose on March 18, 1998, when petitioner entered the State Financial Bank in Milwaukee and presented a teller with a threatening note. The note read, "Please be calm and no one will be hurt. There is a bomb in the bag set to go off in five minutes. Put loose bills in a paper bag. Count to fifteen before calling bomb unit. I will kill us all if necessary." The teller turned over $2,615 to petitioner, who then fled. The police later discovered that a white bag, which petitioner left behind, did not in fact contain a bomb, but contained two pieces of concrete. Presentence Report (PSR) ¶¶ 6, 8-9.

On November 3, 1998, a federal grand jury indicted petitioner on one count of armed bank robbery, in violation of 18 U.S.C. 2113(a) and (d).[3] See J.A. 1. On

[3] The indictment charged a violation of Section 2113(d) in that petitioner, in committing her offense, assaulted another person. J.A. 7; see 18 U.S.C. 2113(d) (enhanced sentence of up to 25 years' imprisonment if defendant "assaults any person, or puts in

December 14, 1998, petitioner pleaded guilty to that charge. See J.A. 17.

In its Presentence Report, the Probation Office recommended that petitioner be sentenced as a career offender under Sentencing Guidelines § 4B1.1, the career offender Guideline. See PSR ¶¶ 25, 79, 142. That Guideline requires that the defendant's offense level be significantly enhanced if she was at least 18 years old when the instant offense of conviction was committed, if the instant offense is a crime of violence or a controlled substance offense, and if the defendant has "at least two prior felony convictions of either a crime of violence or a controlled substance offense." Guidelines § 4B1.1.

The Probation Office (and the U.S. Attorney) took the position that petitioner had two prior felony convictions that were relevant for the career offender Guideline—her state court conviction for armed robbery (which is a crime of violence) and her state court narcotics conviction. That position depended on the finding that petitioner's armed robbery and narcotics convictions are properly counted as two separate prior

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jeopardy the life of any person by the use of a dangerous weapon or device"). Under circuit law interpreting Section 2113(d), petitioner's claim to have a bomb satisfied the element of assault because "an assault is 'committed merely by putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm.'" *United States* v. *Rizzo*, 409 F.2d 400, 403 (7th Cir.) (quoting *Ladner* v. *United States*, 358 U.S. 169, 177 (1958)), cert. denied, 396 U.S. 911 (1969); see also *United States* v. *Cooper*, 462 F.2d 1343, 1344 (5th Cir.) (use of simulated bomb constitutes "assault" under Section 2113(d)), cert. denied, 409 U.S. 1009 (1972); cf. *McLaughlin* v. *United States*, 476 U.S. 16, 17-18 (1986) (holding that unloaded gun is "dangerous weapon" under Section 2113(d) because, among other reasons, "the display of a gun instills fear in the average citizen").

felony convictions. Guidelines § 4B1.2(c), which defines terms for the career offender Guideline, provides that the term "two prior felony convictions" requires (among other things) that "the sentences for at least two of the aforementioned felony convictions are counted separately." Application Note 3 to Guidelines § 4B1.2 further states that the provisions of Guidelines § 4A1.2 (which provides instructions for computing a defendant's criminal history) "are applicable to the counting of convictions under §4B1.1."

Guidelines § 4A1.2(a)(2) in turn provides: "Prior sentences imposed in unrelated cases are to be counted separately. Prior sentences imposed in related cases are to be treated as one sentence for purposes of §4A1.1(a), (b), and (c)" (referring to a defendant's criminal history points). And Application Note 3 to Guidelines § 4A1.2 states, in pertinent part:

> *Related Cases.* Prior sentences are not considered related if they were for offenses that were separated by an intervening arrest (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense). Otherwise, prior sentences are considered related if they resulted from offenses that (A) occurred on the same occasion, (B) were part of a single common scheme or plan, or (C) were consolidated for trial or sentencing.

The government argued that petitioner's prior armed robbery and narcotics convictions were not "related cases" under any of the tests set forth in that Application Note and therefore should be counted as two separate prior felony convictions. Petitioner argued, in response, that her narcotics and armed robbery convictions were "related cases" and therefore should

be counted as only one prior conviction under the career offender Guideline. See Addendum to PSR 1-8.

3. The district court agreed with the government that petitioner's prior convictions were not related cases, and therefore sentenced her under the career offender Guideline. J.A. 20-26, 27-28. The district court focused principally on petitioner's contention that the cases were related because they "were consolidated for trial or sentencing," within the meaning of Application Note 3 to Guidelines § 4A1.2.[4] The district court first noted that "[i]t is quite obvious that the guilty pleas that were entered in these two cases * * * were done on separate days before separate judges," and so the court saw the only question as whether the cases were consolidated "in terms of Judge Geske imposing sentence on May 21st of 1992." J.A. 21. The court further observed that "there was no agreement between the state and [petitioner] and her counsel with regard to the consolidation of these cases, either for purposes of charging or for purposes of disposition," and that "there was no agreement * * * that, in fact, consolidation was an integral part of the sentencing proceeding." J.A. 21.

Thus, the court stated, the only basis for an inference that the cases were "consolidated" was "the fact that sentences were imposed in two different cases on the

[4] Petitioner also argued at sentencing, in abbreviated form, that her offenses were related because they occurred on the same occasion and were part of a single common scheme or plan. See J.A. 18-19, 20. The district court discussed those theories only briefly at sentencing, perceiving that they had little force. J.A. 24-25. Petitioner renewed those arguments in summary form in the court of appeals, see Pet. C.A. Br. 26-27, but the court of appeals found them to be without merit, see J.A. 56, and petitioner has not renewed them in this Court, see Pet. Br. 12.

same date before the same judge, with no formal consolidation order." J.A. 21-22. But that inference was undermined, the court found, by the fact that "two different assistant district attorneys appeared at the sentencing hearing with respect to each of their respective cases." J.A. 22. That fact, the court found, supported a conclusion that the executive branch of the state government, acting within its discretion, had not consolidated the two cases for charging or sentencing purposes, J.A. 22, and that the two prosecutors had "separate interests here," J.A. 24. The court further observed that the two cases were otherwise not related because "[t]he drugs were, other than the temporal relationship, unrelated [to the robberies]. It wasn't as if she was charged with possession of drugs and robbery of someone to have obtained the drugs that she was charged with possessing." J.A. 25. Accordingly, the court applied the career offender Guideline to petitioner and sentenced her to a term of 188 months' imprisonment. J.A. 45, 52.

4. The court of appeals affirmed. J.A. 54-63. Focusing on whether petitioner's state armed robbery and narcotics offenses were "consolidated" under Application Note 3 to Guidelines § 4A1.2, the court stated that, under its decisions, mere "joint sentencing for administrative convenience is not 'consolidation for sentencing'" under that Application Note, but that "a formal order of consolidation is unnecessary," and "cases may be deemed functionally consolidated when they are factually or logically related, and sentencing was joint." J.A. 58. The court suggested that "elements of [petitioner's] situation support either characterization," and so "the standard of appellate review may be dispositive." J.A. 59.

The court of appeals then concluded that it should apply a deferential standard of review to the district court's determination that petitioner's state court charges were not consolidated. J.A. 59-63. The court remarked that "relatedness" and "consolidation" are not "pure questions of law," as "[n]o legal rule specifies what it means for cases to be 'consolidated for sentencing.'" J.A. 60. Rather, because the court had adopted a "functional approach to consolidation, it [is] impossible to say that one characterization rather than another [of the record of state proceedings] is mandatory." J.A. 60. The court concluded that "[w]e have instead a classic mixed issue, where the court must apply legal norms to classify the facts. And disputes about the proper characterization of events, when legal norms guide rather than determine the answer, are principally committed to the district courts, with deferential appellate review." J.A. 60-61. In particular, the court relied on *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384 (1990), which it read to hold that, "when the legal inquiry resists statement as a rule of general applicability, and when the application of that rule is a case-specific determination, courts of appeals should treat the district judges' conclusions deferentially." J.A. 61.

The court further observed that "[h]ow best to understand the events in the Wisconsin courts in spring 1992 has no significance beyond these parties." J.A. 62. In addition, it noted that "[q]uestions concerning application of the Guidelines generally are reviewed deferentially, unless the district court makes an identifiable legal mistake." J.A. 62 (citation omitted). Thus, it concluded, "whether cases have been 'consolidated' for trial or sentencing is a matter of fact, to be reviewed deferentially by the court of appeals." J.A. 62. Because the court of appeals could not conclude (and petitioner did not argue) that the district court had clearly erred in finding that petitioner's state court cases were not consolidated, the court of appeals affirmed the district court's application of the career offender Guideline to petitioner's sentence. J.A. 62-63.

SUMMARY OF ARGUMENT

A. The court of appeals correctly applied a deferential standard of review to the district court's determination that petitioner's two prior convictions had not been functionally consolidated, and were therefore not related under Sentencing Guidelines § 4A1.2. The issue before the district court was not (as petitioner maintains) the legal construction of the term "related" in that Guideline, nor the legal construction of the term "consolidated" in Application Note 3 to that Guideline. Rather, the issue before the district court was whether, on the facts of this case, petitioner's prior sentences had in fact been functionally consolidated.

The resolution of the functional-consolidation question turns primarily on the historical facts, as determined by the district court. Just as a district court may determine as a factual matter whether a defendant's offenses were separated by an intervening arrest, occurred on the same occasion, or were part of a single common scheme or plan—all of which are determinations that dictate whether or not the defendant's offense were "related" under the Guideline—so a district court determines whether those offenses in fact were actually or functionally consolidated. If the district court concludes that the offenses were functionally consolidated, then it follows as a matter of law under the applicable Guideline that they were "related." Such intensely factual determinations plainly qualify for deferential review in the court of appeals.

B. The Court need not view the consolidation question as a pure factual issue in order to conclude that deferential review applies. The court of appeals viewed the functional-consolidation issue as a mixed question of fact and law, and the text of the Sentencing Reform Act of 1984, at 18 U.S.C. 3742(e), requires that the court of appeals give "due deference to the district court's application of the guidelines to the facts." Under that provision, the court of appeals should not engage in plenary review of the district court's determination that a defendant's prior convictions were "consolidated," provided that the district court applies the correct legal rule governing what it means to be "consolidated." Rather, in reviewing the characterization of the facts under the Guidelines, the courts of appeals should give deference to the sentencing court's determinations. The long historical tradition of district court discretion in sentencing also indicates that the proper standard of appellate review is deferential. The Sentencing Reform Act did not displace that long tradition, and it allowed the courts of appeals to engage in only a limited supervision of district court sentencing decisions. Moreover, the sentencing determination at issue in this case, which bears on the seriousness of a defendant's prior criminal history, is a classic kind of sentencing decision in which trial courts have long engaged and have substantial expertise.

Institutional considerations also point towards a deferential standard of review. Little would be gained by *de novo* appellate review of the kind of Guidelines application at issue in this case. District courts have superior institutional capacity to that of the courts of appeals to ensure that the Guidelines are uniformly applied, because they encounter many more Guidelines cases than do the appellate courts. The district courts

will also be required to engage in an extensive review of the records of the defendants' prior cases and to draw factual inferences from those records about what the actors in the prior cases intended to do. There is no reason to conclude that that task will be performed better or more accurately if a layer of plenary appellate review is added. Nor is there any other reason to require *de novo* appellate review. Guidelines determinations that apply rules of decision to particular facts do not require courts to clarify laws that affect primary conduct in large numbers of cases, an activity that typically calls for plenary appellate review. For example, the functional-consolidation determination is not intended to guide the conduct of the police with respect to individuals' constitutional rights. Rather, it is a purely retrospective evaluation of a state court's conduct that is likely to be of little relevance for state courts in future situations when they decide whether to consolidate a defendant's criminal cases.

ARGUMENT

THE COURT OF APPEALS CORRECTLY APPLIED A DEFERENTIAL STANDARD OF REVIEW TO THE DISTRICT COURT'S CONCLUSION THAT PETITIONER'S PRIOR CONVICTIONS WERE NOT CONSOLIDATED

Section 3742(e) of Title 18 provides that, when an appeal of a sentencing decision is taken,

> [t]he court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous *and shall give due deference to the*

district court's application of the guidelines to the facts.

18 U.S.C. 3742(e) (emphasis added). This Court has explained that Section 3742(e), including the language just quoted, "manifests an intent that district courts retain much of their traditional sentencing discretion." *Koon* v. *United States*, 518 U.S. 81, 97 (1996). Indeed, Congress's use of the phrase "due deference" in Section 3742(e) "seems incompatible with the nature and scope of de novo review. When courts review an issue de novo, they consider the matter anew, as if it had not been heard before and as if no decision had previously been rendered. This is hardly consistent with a requirement to give due deference." Steven E. Zipperstein, *Certain Uncertainty: Appellate Review and the Sentencing Guidelines*, 66 S. Cal. L. Rev. 621, 636 (1992) (internal quotation marks and footnotes omitted).

The question in this case—whether petitioner's prior convictions were consolidated as a functional matter for purposes of determining how many prior convictions she had under the Sentencing Guidelines—calls for deferential review. While the consolidation question, like other relatedness determinations, revolves around findings of historical fact, the Court need not classify it as a purely factual inquiry in order to hold that a deferential standard of review applies on appeal. A district court's determinations of mixed questions requiring the application of the Guidelines to the facts are entitled to "due deference," 18 U.S.C. 3742(e), and that means deferential rather than *de novo* review under the analysis established by this Court's precedents.

A. Determining Whether A Defendant's Prior Convictions Were Functionally Consolidated Turns Predominantly On The Ascertainment Of Historical Facts

1. At the outset, it is important to identify the precise issue that the district court faced in determining whether petitioner should be sentenced under the career offender Guideline. Petitioner argues (Pet. Br. 17) that the lower courts were called upon to determine whether her two prior convictions were "related" within the meaning of Guidelines § 4A1.2(a)(2). She further contends (Pet. Br. 29) that that task required the lower courts to construe the term "related" in that Guideline, as well as the term "consolidated" in Application Note 3 to that Guideline. Therefore, she submits (Pet. Br. 19, 29), the lower courts were necessarily engaged in interpretation of the meaning of the Guideline and the Application Note, a "classic textual analysis" (*id.* at 29) that is a "quintessentially legal" task (*id.* at 34).

Petitioner's arguments misperceive the issue that the district court resolved and that the court of appeals reviewed. In a sense, it is true that the lower courts were ultimately required to determine whether petitioner's prior convictions were "related," in that the Sentencing Guidelines required sentencing as a career offender if and only if her two prior convictions were not related. But it is not true that the lower courts were required in this case to *construe* the meaning of the term "related" in the Sentencing Guidelines. Rather, that task was undertaken by the Sentencing Commission in Application Note 3 to Guidelines § 4A1.2, where the Commission defined "related cases" to mean that the defendant's sentences "(A) occurred on the same occasion, (B) were part of a single common

scheme or plan, or (C) were consolidated for trial or sentencing." The Sentencing Commission's commentary to Guidelines § 4A1.2 gave the pertinent legal interpretation of the meaning of the Guideline; it provided a generally applicable definition of "related cases" to include cases that "were consolidated for trial or sentencing." Cf. *Stinson* v. *United States*, 508 U.S. 36, 44 (1993) (analogizing commentary to career offender Guideline to "an agency's interpretation of its own legislative rule").

Nor were the lower courts called upon in this case to construe the meaning of the term "consolidated" in Application Note 3 to Guidelines § 4A1.2. That task had previously been performed by the Seventh Circuit, which had concluded in prior decisions that the concept of "consolidated" cases in that Application Note (and, therefore, the concept of "relatedness" in the Guideline) is sufficiently broad to include, not just cases that had been consolidated by a formal court order, but also cases that had been "functionally" or "*de facto*" consolidated.[5] See J.A. 58 ("[W]e have * * * held that * * * cases may be deemed functionally consolidated when they are factually or logically related, and sentencing was joint."). The legal question whether the term "consolidated" in the Application Note includes cases that were functionally as well as formally con-

[5] See *United States* v. *Joseph*, 50 F.3d 401, 404 (7th Cir.) (stating that "we have held * * * that functional consolidation satisfies Application Note 3"), cert. denied, 516 U.S. 847 (1995); *United States* v. *Russell*, 2 F.3d 200, 204 (7th Cir. 1993) (stating general rule that, "[i]f the record should show that the sentencing court gave some kind of consolidated effect in the sentencing on different charges * * * there might well be a sufficient showing that the court had made a decision that the cases should be consolidated").

solidated *is* a matter of textual interpretation on which a court of appeals would not owe deference to a district court's determination.[6] But that is not the issue that was before the lower courts in this case.[7]

[6] It is also a question on which the courts of appeals are divided. The government has argued in the lower courts that as a legal matter the term "consolidated" in Application Note 3 to Guidelines § 4A1.2 means only cases that were formally consolidated, and not functionally or *de facto* consolidated. Some courts of appeals have agreed with that position, see, *e.g.*, *United States* v. *Correa*, 114 F.3d 314, 317 (1st Cir.) (collecting cases), cert. denied, 522 U.S. 927 (1997), but others have not (including the Seventh Circuit, in which this case arose). In this case, the court of appeals followed prior circuit precedent including functional consolidation within the meaning of the term "consolidated," and the government did not seek further review of that ruling. Therefore, this case comes to the Court on the assumption that two prior cases that are shown, on a particular record, to have been "functionally consolidated" are "consolidated" within Application Note 3 to Guidelines § 4A1.2, and are therefore also "related" cases under that Guideline.

[7] The difference between the construction of the *legal* meaning of the Guideline and the Application Note, which had already been performed by the Sentencing Commission and the Seventh Circuit, and the application of that Guideline and Application Note as so construed to the facts of this case, resembles the distinction between the two tasks undertaken by this Court in *Pierce* v. *Underwood*, 487 U.S. 552 (1988). In *Pierce*, the Court addressed the Equal Access to Justice Act (EAJA), which provides (at 28 U.S.C. 2412(d) (1994 & Supp. IV 1998)) that a district court may award attorney's fees against the government if the court finds that the government's position was not "substantially justified." That case required the Court both to determine the legal meaning of the term "substantially" (487 U.S. at 563-568) and to review whether the district court had properly applied that term to the facts of the case (*id.* at 568-571). The Court made the first determination *de novo*, as appropriate to a court's ascertainment of the meaning of the statute, but reviewed the district court's application of the

Rather, the question before the lower courts in this case was whether petitioner's two prior convictions were, on the facts of this case, functionally or de facto consolidated. At issue, therefore, was not the interpretation of the Guideline, but whether the Guideline directing that "related" cases be treated as a single case —as previously interpreted by the Sentencing Commission and the court of appeals to reach cases that were "functionally consolidated" —applied to the facts of this particular case. That question presented the district court with the task of determining and classifying historical facts, not a problem of textual analysis.

2. The issue before the district court in this case, therefore, turned primarily on the facts. Indeed, that is true for each of the ways that cases may be "related" under Guidelines § 4A1.2. Application Note 3 to that Guideline first sets forth a legal rule that "[p]rior sentences are not considered related if they were for offenses that were separated by an intervening arrest." The Note further gives content to the Guideline by providing the three-pronged definition of "related cases" discussed above ("occurred on the same occasion"; "part of a single common scheme or plan"; "consolidated for trial or sentencing"). See pp. 15-16, *supra*. Thus, the Application Note establishes four subcategories to the category of "related cases." But whereas the Sentencing Commission's undertaking to give more precise content to the general category of "related cases" was a legal function, the task of determining whether a particular case falls into one of the four subcategories is a matter to be determined on the facts of each case.

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statute to the facts of the case for abuse of discretion (*id.* at 559-563, 570-571).

The question whether a defendant's previous offenses were "separated by an intervening arrest" ordinarily presents a binary temporal issue: either a defendant's two offenses were separated by an arrest, or they were not. While there may occasionally be cases in which it is difficult to determine whether two offenses were in fact separated by an arrest, that issue is fundamentally a question of historical fact.[8] Similarly, the question whether two offenses "occurred on the same occasion" is normally a factual question for the district court to resolve. If the district court determined that the two offenses did, as a factual matter, occur on the same occasion, then, as a legal matter, the offenses would also be deemed "related" under Guidelines § 4A1.2. But the logically prior question whether the offenses occurred on the "same

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[8] See, *e.g.*, *United States* v. *Huggins*, 191 F.3d 532, 539 (4th Cir. 1999) (applying clear-error review to district court's determination that defendant's two offenses were separated by an intervening arrest), cert. denied, 120 S. Ct. 1968 (2000). We do not mean to suggest, however, that the factual question whether a defendant's offenses were separated by an intervening arrest will never have a legal component. For example, a trial court, in determining whether a defendant's offenses were temporally separated, might have to resolve the legal question whether a particular offense is deemed a "continuing crime." The answer to that legal question would be subject to *de novo* review in the court of appeals, and if the court of appeals concluded that the district court had erred in its legal characterization of the crime, then it might be required to remand the case for resentencing. Cf. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982) ("[I]f a district court's findings rest on an erroneous view of the law, they may be set aside on that basis."). But once the courts arrived at the proper answer to such legal questions, the question whether the defendant's offense actually continued to a particular date would be a factual issue for the district court to resolve, subject to deferential review on appeal.

occasion" would generally be an issue of fact on which the court of appeals would give deference to the district court's determination.

The same is true of a district court's determination whether a defendant's prior offenses were "part of a single common scheme or plan" under Application Note 3 to Guidelines § 4A1.2. As the Second Circuit has observed, "[w]hether or not acts have been performed pursuant to a 'single common scheme or plan' is essentially a question of fact—both as to whether a single common scheme or plan existed and as to whether the prior offenses were part of it." *United States* v. *Butler*, 970 F.2d 1017, 1024, cert. denied, 506 U.S. 980 (1992). Most courts of appeals have adopted an intensely factual approach to the "common scheme or plan" issue. Courts have stated, for example, that the proper focus under that prong of the "related crimes" test should be on the "factual commonality" between the crimes, "as reflected in criteria such as temporal and geographical proximity" and "common victims,"[9] and that resolution of the matter ordinarily requires an

[9] *United States* v. *Wiseman*, 172 F.3d 1196, 1219 (10th Cir.), cert. denied, 120 S. Ct. 211 (1999); see also *United States* v. *Mullens*, 65 F.3d 1560, 1565 (11th Cir. 1995) (looking to "common victims, common accomplices, common purposes, or similar *modus operandi*"; applying clear-error review), cert. denied, 517 U.S. 1112 (1996); *United States* v. *Elwell*, 984 F.2d 1289, 1295-1296 (1st Cir.) (remanding for evidentiary hearing on "single common scheme or plan" issue, noting that defendant offered to call his fellow bank robbers to confirm that their robberies were part of the same conspiracy, and stating that "there is nothing implausible about [that] proffer"), cert. denied. 508 U.S. 945 (1993).

examination of the subjective intent of the defendant in carrying out his crimes.[10]

So too here, the question whether a defendant's prior convictions were "consolidated" for trial or sentencing turns predominantly on questions of fact, like the other three inquiries bearing on whether a defendant's prior offenses were "related cases." Indeed, the very concept of functional consolidation requires the sentencing court to determine whether the court that adjudicated the defendant's prior cases *in fact* treated them as though they were consolidated, even though they were not consolidated as a formal matter. While there is an element of characterization in that analysis, the basic question is the essentially factual one of how the previous trial court actually acted, not whether its actions had particular legal consequences for its court system (although evidence of the consequences of its action may shed light on the proper resolution of that factual question). Cf. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289-290 (1982) ("Discriminatory intent here means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive."). Thus, courts have described the "functional consolidation" issue as whether the prior court "effec-

[10] See *United States* v. *Beckett*, 208 F.3d 140, 148 n.3 (3d Cir. 2000) (emphasizing "the intent of the defendant at the time of the prior offense"); *United States* v. *Irons*, 196 F.3d 634, 638-639 (6th Cir. 1999) (stating that "'scheme' and 'plan' are words of intention," and holding that the "defendant must show that he either intended from the outset to commit both crimes or that he intended to commit one crime which, by necessity, involved the commission of a second crime"); *United States* v. *Joy*, 192 F.3d 761, 770 (7th Cir. 1999) (same), cert. denied, 120 S. Ct. 2704 (2000); *Butler*, 970 F.2d at 1024 ("Both inquiries require an evaluation of subjective as well as objective elements[.]").

tively" or "*de facto*" treated the two offenses as one.[11] That determination is closely akin to the kind of fact-finding that is typically made the principal responsibility of the district courts.

To the extent that the question whether a defendant's prior convictions were functionally consolidated depends on issues of historical fact, the district court's determination on that issue is plainly subject to deferential review on appeal. See *Ornelas* v. *United States*, 517 U.S. 690, 699 (1996); cf. *Maine* v. *Taylor*, 477 U.S. 131, 145 (1986).[12] But the Court need not view the ultimate determination of the functional-consolidation question as purely factual in order to apply deferential review, because applications of law to facts under the Guidelines also call for deferential rather than *de novo* review.

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[11] See *United States* v. *Huskey*, 137 F.3d 283, 288 (5th Cir. 1998) ("*de facto* 'consolidated'"); *Russell*, 2 F.3d at 204 ("functional consolidation" requires "a record that shows the sentencing court considered the cases sufficiently related for consolidation and effectively entered one sentence for the multiple convictions"); see also *United States* v. *Mapp*, 170 F.3d 328, 338 & n.15 (2d Cir.) (stating that court will consider cases functionally consolidated "only where there exists a close factual relationship between the underlying convictions," and applying clear-error standard of review to that determination, in light of "the (obviously) fact-intensive nature of the inquiry") (internal quotation marks omitted), cert. denied, 120 S. Ct. 239 (1999).

[12] The district court may be required to make subsidiary factual findings before making the "ultimate" determination whether a defendant's prior cases were consolidated. The system of appellate review in the federal courts has traditionally not divided "findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts." *Pullman-Standard*, 456 U.S. at 287. All factual findings are subject to deferential review on appeal.

B. Deferential Review On Appeal Is Appropriate For Resolutions Of The Question Of Relatedness Or Functional Consolidation

The court of appeals viewed the questions of "relatedness" and "consolidation" in the application of Guidelines § 4A1.2 to be "a classic mixed issue, where the court must apply legal norms to classify the facts." J.A. 60. That position reflects the view that the concept of functional consolidation involves the characterization of historical fact under legal standards. It nonetheless remains true that the central question in functional-consolidation turns on analysis of the way in which the cases were treated by the original sentencing court. The standard of appellate review of that sort of application of law to fact should be deferential. That conclusion follows from the text of the statute, this Court's decisions, and the nature of the decision before the district court.

This Court has stated on several occasions that no bright line separates those mixed questions of fact and law that are principally committed to the decision-making of the district courts from those that are subject to *de novo* review on appeal. Compare, *e.g.*, *Pierce* v. *Underwood*, 487 U.S. 552, 559-560 (1988), with *Miller* v. *Fenton*, 474 U.S. 104, 113-114 (1985). The Court has, however, pointed to several factors to identify the proper standard of appellate review of trial court determinations. Congressional intent may dictate the appropriate standard of review. *Pierce*, 487 U.S. at 558-559 (noting that proper standard of review may appear from a "clear statutory prescription"); *Miller*, 474 U.S. at 114 (noting possibility that Congress may have spoken to the issue). The proper standard may also appear from "a long history of appellate practice"

or "a historical tradition." *Pierce*, 487 U.S. at 558; see also *Thompson* v. *Keohane*, 516 U.S. 99, 113 n.13 (1995) (noting tradition of entrusting determination of "negligence" to trier of fact). Where, however, neither congressional intent nor tradition yields the answer, and where the issue "falls somewhere between a pristine legal standard and a simple historical fact" (*Miller*, 474 U.S. at 114), the Court has generally concluded that the proper standard of review should turn on institutional considerations—in particular, whether, "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Ibid.*

In this case, all those factors point decisively in favor of deferential review. As we now explain, the Sentencing Reform Act of 1984 and the tradition of trial court discretion in sentencing mark the decision at issue in this case as precisely the kind in which an appellate court should defer to the conclusions of the court below. Even absent such a statutory command and tradition, institutional considerations make clear that little is to be gained, and much to be lost, from *de novo* appellate review of a district court's application of the Guidelines to the facts of a particular case.

1. ***The Text of the Sentencing Reform Act Requires Deferential Review of the District Court's Application of the Guidelines to a Particular Case***

This case presents a circumstance in which a "clear statutory prescription" (*Pierce*, 487 U.S. at 558-559) establishes the appropriate standard of review. Section 3742(e) of Title 18 provides that, when an appeal of a sentencing decision is taken, the court "shall give due deference to the district court's application of the guidelines to the facts." 18 U.S.C. 3742(e) (emphasis

added). As the Court noted in *Koon* v. *United States*, 518 U.S. at 97, the statute was intended to preserve the district court's traditional discretion in determining an appropriate sentence under the Guidelines.

Section 3742(e) does require only that the courts of appeals give "due" deference to the trial courts' application of the Guidelines to particular sets of facts, not that the courts of appeals defer in every circumstance. See *Koon*, 518 U.S. at 98 ("That the district court retains much of its traditional discretion does not mean appellate review is an empty exercise."). Thus, if the district court errs in its legal interpretation of a Guideline, the court need not defer to its application of that Guideline to a set of facts. *Id.* at 100 ("A district court by definition abuses its discretion when it makes an error of law."); see, *e.g.*, *Butler*, 970 F.2d at 1025 (remanding for resentencing because the district court erroneously concluded, as a matter of law, that temporally separated crimes can never be part of the same common scheme or plan). Nor must the court of appeals defer to a district court's factual decision in which egregious error is manifest. See, *e.g.*, *United States* v. *Rivers*, 929 F.2d 136, 139-141 (4th Cir.) (finding clear error in lower court's determination that defendant was not a career offender), cert. denied, 502 U.S. 964 (1991). But Section 3742(e) makes clear that, in the absence of legal error or clear factual error, the district court's determination that a Guideline applies to a particular set of facts is controlling.

2. *The Tradition of District Court Discretion in Sentencing Favors Deferential Appellate Review*

The historical tradition of broad district court discretion in sentencing decisions also supports the conclusion that a district court's application of a Guideline to a particular set of facts should be reviewed deferentially. "Before the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal." *Koon*, 518 U.S. at 96. The Sentencing Reform Act "altered this scheme in favor of a limited appellate jurisdiction to review federal sentences," *ibid.*, but that Act did not "vest in appellate courts wide-ranging authority over district court sentencing decisions," *id.* at 97; see *Williams* v. *United States*, 503 U.S. 193, 205 (1992) (the Sentencing Guidelines system "did not alter a court of appeals' traditional deference to a district court's exercise of its sentencing discretion"). To the contrary, under the Guidelines system, the task of sentencing remains a highly individualized function in which the district court "must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing." *Koon*, 518 U.S. at 98.

Indeed, if deference is appropriate to any aspect of a district court's decision that a Guideline applies to a particular set of facts, it is in this area, which involves the district court's determination of the defendant's prior criminal history. As the Court observed in *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998), recidivism is "as typical a sentencing factor as one might imagine." *Id.* at 230 (citing, *inter alia*, Guidelines §§ 4A1.1, 4A1.2). Sentencing courts have long experience with evaluating the seriousness of a

defendant's criminal history. See *id.* at 243 (noting that laws directing sentencing judges to increase punishment for recidivists "have a long tradition in this country that dates back to colonial times"). That experience well equips district courts to determine whether nominally different offenses in a defendant's past in fact reflect different (and persistent) manifestations of criminal conduct, or whether they are simply parts of a single incident that might not be repeated, or that has been treated as a single integrated set of violations for purposes of determining appropriate punishment.

3. *Institutional Considerations About the Sentencing Decision at Issue in This Case Also Support Deferential Review*

As we noted above (p. 24, *supra*), in determining whether a district court's decision on a mixed question of fact or law should be subject to deferential or plenary review on appeal, the Court has often looked to institutional considerations to determine which court is "better situated" to apply a legal standard to a particular set of facts. See *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 402 (1990) (in determining whether facts of a particular case showed that a lawyer's actions met the standard of "frivolous" under Federal Rule of Civil Procedure 11, "the district court is better situated than the court of appeals to marshal the pertinent facts and apply the fact-dependent legal standard mandated by Rule 11"). Institutional considerations strongly favor a deferential standard of appellate review to a district court's determination that a defendant's prior convictions were "consolidated" or "related."

a. A crucial institutional consideration is the district courts' leading role in promoting uniformity of sen-

tencing decisions. While in some circumstances the courts of appeals play the principal role in ensuring the uniform application of legal rules to particular sets of facts,[13] this Court has stressed that the application of the Guidelines system is not such a situation. "District courts have an institutional advantage over appellate courts" in managing the mine-run of sentencing cases because "they see so many more Guidelines cases than appellate courts do." *Koon*, 518 U.S. at 98. In deciding whether a defendant's two prior convictions were or were not consolidated, even a single district judge is likely to have much more information about how the same issue was treated in previous cases than a three-judge appellate panel, which is limited to prior reported decisions. The tip of the iceberg that the court of appeals views, moreover, may well not present a reliable cross-section of sentencing cases. Only a small minority of Guidelines sentencing determinations are appealed, see *id.* at 98-99, and those cases that involve application of law to fact (rather than clarification of legal issues under the Guidelines) are likely to be ones in which the appellant, be it the government or defense counsel, believes that the facts are aberrant and therefore call for error correction by the higher court. The trial court is more likely than the appellate court to have an accurate perception of how a particular issue involving the application of the Guidelines is resolved in the ordinary case.

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[13] See, *e.g.*, *Ornelas* v. *United States*, 517 U.S. 690, 697-698 (1996) (defining probable cause and reasonable suspicion); *Thompson* v. *Keohane*, 516 U.S. 99, 115 (1995) (whether defendant is "in custody" requiring warnings under *Miranda* v. *Arizona*, 384 U.S. 436 (1966)); *Miller* v. *Fenton*, 474 U.S. at 114 (voluntariness of confession).

Second, the determination whether a defendant's convictions were functionally consolidated is likely to involve the district court in an extensive review of the records of the defendant's prior cases and may well require the court to make factual inferences about matters that do not appear clearly in the record. As we have explained, the very concept of functional consolidation requires a sentencing court to determine whether a prior trial court effectively treated two cases as one. The trial court is likely to have more insight about the practice of another trial court (even of another court system) facing similar concerns of workload and the administration of justice at the front line than is an appellate court. But even aside from that point, decisions in cases like this one require sentencing courts to infer, from the records of the defendant's prior cases, the way that the judges, prosecutors, defense counsel, and defendants in those cases understood how those cases were treated. There is no evident reason why a second, *de novo* review of the same materials by courts of appeals would necessarily yield more accurate results as a systemic matter.

Petitioner argues (Pet. Br. 34) that that determination turns on the interpretation of documents (the records of the prior cases) rather than the credibility of witnesses and so does not involve any special expertise of the district court. Live testimony may ordinarily not be necessary in resolving the consolidation issue, but there are likely to be cases in which transcripts are unavailable or the existing records leave gaps that must be filled by memories of the participants in order to determine what actually was intended to happen and what did happen at sentencing. In addition, this Court has recognized that, even apart from credibility determinations, deferential appellate review is also appropri-

ate "when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 574 (1985). Thus, a district court's inferences from a record of a prior case about how that case was managed—precisely the issue here—should also be entitled to deference on appeal.

b. By contrast, the "functional consolidation" issue does not present the institutional considerations that typically call for plenary appellate review. First, that determination does not require the court of appeals to enunciate or clarify general principles of law that will be applicable in a broad range of cases. As we have explained (pp. 15-17, *supra*), while the *textual explication* of a Guideline does involve that kind of legal determination, the application of a Guideline to a particular set of facts generally does not. Thus, contrary to petitioner's submission (Pet. Br. 35), the application of a Guideline to a particular set of facts is quite unlike the federal courts' function of determining state law (in diversity cases) or foreign law. In those situations, before the federal court applies the legal principle to a set of facts, it must determine and announce what the law is. That decision may have consequences far beyond the particular case before the court—indeed it may determine the outcomes in future cases in other court systems—and so in those contexts it is particularly important that the federal courts arrive at a coherent understanding of the state of the law. See *Salve Regina College* v. *Russell*, 499 U.S. 225, 234 (1991). But a district court's application of a Guideline to a set of facts affects only the one case and does not establish a binding precedent for future cases before that district court or any other.

Second, the "functional consolidation" determination (or, even more broadly, the "relatedness" determination) is not intended to guide the primary conduct of other actors in the criminal justice system through the announcement of broadly applicable rules of constitutional law. In this respect the issue of consolidation is unlike the issues of probable cause and reasonable suspicion in *Ornelas* v. *United States*, 517 U.S. 690 (1996), the issue of custody in *Thompson* v. *Keohane*, 516 U.S. 99 (1995), and the issue of voluntariness in *Miller* v. *Fenton*, 474 U.S. 104 (1985). Those cases all involve situations where the federal courts are called upon to interpret the Constitution so that law enforcement officers will have a "set of rules which, in most instances, makes it possible to reach a correct determination beforehand" as to whether a particular law-enforcement action is justifiable. *Ornelas*, 517 U.S. at 697.

The consolidation issue, by contrast, involves a purely retrospective determination about how another court acted on a particular occasion. There is little reason to believe that a sentencing court's decision as to how another court acted will provide useful precedent for the future. In the first place, when a state trial court decides whether to treat a defendant's cases pending before it as *de facto* consolidated, it is most likely concerned with immediate issues of judicial economy and efficiency (and perhaps consequences for co-defendants' pending cases). It is much less likely that the court will have in mind possible consequences for the defendant's criminal history score in the future, should the defendant be convicted in the cases before it and then proceed to commit more crimes in the future.

Moreover, even if state trial courts might monitor federal courts' determinations that particular past cases

were or were not functionally consolidated, it is unlikely that the federal courts' decisions would provide useful guidance to them. State court systems vary widely. Also, the factual situations facing state trial courts in making decisions whether to treat cases as *de facto* consolidated are highly varied. There is little reason to believe that (for example) a Wisconsin state court faced with two narcotics charges against a defendant will find much useful guidance from a federal decision concluding that a Nevada state court five years earlier treated a particular defendant's two armed robbery cases as functionally consolidated.

c. In sum, the sentencing issue before the district court in this case is precisely the kind of matter that trial courts are well suited to resolve, and duplication of that effort at the appellate level would contribute only negligibly to the accuracy of the determination. Accordingly, the court of appeals correctly applied a deferential standard of review in this case and properly affirmed the sentence imposed by the district court.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 2000

APPENDIX

1. Section 3742(e) of Title 18, United States Code, provides in pertinent part:

> The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

2. Sentencing Guidelines § 4A1.2(a)(2) provides:

> Prior sentences imposed in unrelated cases are to be counted separately. Prior sentences imposed in related cases are to be treated as one sentence for purposes of §4A1.1(a), (b), and (c). Use the longest sentence of imprisonment if concurrent sentences were imposed and the aggregate sentence of imprisonment imposed in the case of consecutive sentences.

3. Application Note 3 to Sentencing Guidelines § 4A1.2 provides:

> *Related Cases.* Prior sentences are not considered related if they were for offenses that were separated by an intervening arrest (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense). Otherwise, prior sentences are considered related if they resulted from offenses that (A) occurred on the same occasion, (B) were part of a single common scheme or plan, or (C) were

consolidated for trial or sentencing. The court should be aware that there may be instances in which this definition is overly broad and will result in a criminal history score that underrepresents the seriousness of the defendant's criminal history and the danger that he presents to the public. For example, if a defendant was convicted of a number of serious non-violent offenses committed on different occasions, and the resulting sentences were treated as related because the cases were consolidated for sentencing, the assignment of a single set of points may not adequately reflect the seriousness of the defendant's criminal history or the frequency with which he has committed crimes. In such circumstances, an upward departure may be warranted. Note that the above example refers to serious non-violent offenses. Where prior related sentences result from convictions of crimes of violence, §4A1.1(f) will apply.

4. Sentencing Guidelines § 4B1.1 provides, in pertinent part:

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

5. Sentencing Guidelines § 4B1.2(c) provides:

> The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.

6. Application Note 3 to Sentencing Guidelines § 4B1.2 provides:

> The provisions of §4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under § 4B1.1.

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PAULA L. BUFORD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

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SUMMARY OF ARGUMENT

A. Fundamentally, the court of appeals below continued its interpretation of the Guidelines terms "related" and "consolidated," contrary to Respondent's argument. While functional consolidation doctrine itself results from legal construction of the Guidelines, that does not mean the interpretive task of further defining relatedness and consolidation becomes fact-finding in the district court. Historical facts remain reviewable only for clear error, Petitioner agrees, but the question here was a mixed one of the scope and meaning of terms used in Guidelines and application notes.

B. Neither congressional directive nor the tradition of trial court discretion in sentencing determines the standard of review here. This Court's earlier decisions in the area provide the guide, and lead to de novo review.

1. Standing alone, the "due deference" provision of 18 U.S.C. § 3742(e) does not point to a particular standard of review. It requires reference to the type of question at issue, as this Court said in *Koon v. United States*, 518 U.S. 81, 98 (1996). More deference is due determinations that tip factual; less is due determinations predominantly legal. The short legislative reference to what is "due" suggests recourse to this Court's standard of review decisions.

2. Likewise, traditional sentencing discretion suggests no standard of review here. This determination was not discretionary under any view. It either was factual or it was legal. Reliance on sentencing discretion misdirects because it offers neither good reasons for de novo review, nor good reasons for clear error review.

3. On balance, this Court's jurisprudence on standards of review counsels de novo review here. Because the principal congressional concern with lack of uniformity in sentencing lay across district lines, not within districts, appellate courts better than district courts can advance uniformity. Further, the Sentencing Commission's data undercut Respondent's claim that the courts of appeals decide too few Guidelines cases to promote that uniformity. In this area of federal sentencing, de novo review will guide the primary conduct of district judges, federal prosecutors and defense counsel. Not only police officers matter in deciding a standard of review.

ARGUMENT

Petitioner pled guilty to her state court armed robbery case in the county circuit court branch assigned initially only to her drug case. 7th Cir. Supp. App. 159. Why Judge DiMotto, rather than Judge Geske, presided that day now is a mystery. But it matters not, as the docket sheet for the armed robbery case leaves no doubt that the guilty pleas occurred in Judge Geske's drug branch.

Indeed, at the conclusion of Petitioner's pleas to armed robbery, Judge DiMotto simply "adjourn[ed] the matter for sentencing before Judge Geske on May 21, 1992 at 8:30 a.m. This sentencing to be in conjunction with the sentencing on the other case you have in Judge Geske's Court." 7th Cir. Supp. App. 169. Were Judge DiMotto acting either in his own branch or in Judge Wedemeyer's, only a transfer of the case would have accomplished that

scheduling before Judge Geske. The record reflects no such transfer.

THE SCOPE OF THE SENTENCING GUIDELINES TERMS "RELATED" AND "CONSOLIDATED" CALLS FOR DE NOVO REVIEW ON APPEAL

The government's argument for deferential review is not persuasive for two principal reasons. First, both the district court and the appellate court primarily undertake textual interpretation, not fact-finding, when they explicate an earlier construction of a statute or Sentencing Guideline. Second, neither Congress nor the traditions of federal sentencing alter the application of this Court's jurisprudence to mixed questions that arise well short of choosing a final sentence.

A. Statutory Construction Remains Legal, Not Factual, Even If Complicated By An Earlier Gloss.

1. Contrary to Respondent's view, the district court and the court of appeals below necessarily addressed the terms "related" and "consolidated," as the United States Sentencing Guidelines use them, in deciding Petitioner's challenge. Those are the Sentencing Commission's terms; the Commission nowhere speaks of cases "functionally consolidated," as Respondent does. *See* Govt. Br. 11, 18.

2. Instead, judicial interpretation and construction produced functional consolidation doctrine, as the United States acknowledges. Govt. Br. 16-17. By further interpreting an interpretation, or by refining a judicial gloss,

federal courts do not convert textual construction from a legal task to a factual one. *Contra* Govt. Br. 16-18. If the very concept of functional consolidation is controversial, as Respondent says, Govt. Br. 17 n.6, then how odd it would be if an appellate court could insulate such questionable doctrine in subsequent cases by reviewing the doctrine's application deferentially.

The Seventh Circuit's opinion bears out that court's focus on relatedness and consolidation, the Guidelines' terms. The court posed an early question, "So when are cases 'related'?," as it turned to its analysis. App. 55. It then described Petitioner as contending "that the imposition of sentence by a single judge on a single occasion was a consolidation of the drug offense with the armed robberies for sentencing, within the meaning of Application Note 3." App. 57. The court of appeals went on to write that, " 'Relatedness' and 'consolidation' are not pure questions of law." App. 60. Finally, it referred again to the concept of "relatedness" as a preface to "hold[ing] accordingly that whether cases have been 'consolidated' for trial or sentencing is a matter of fact, to be reviewed deferentially by the court of appeals." App. 62.[1]

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[1] The district court also appreciated the core interpretive task, having clarified the historical facts. "And so to the extent that either the government or you, Mr. Kagen [defense counsel], have any additional argument you want to make," the trial judge commented, "the court is simply left to draw from the record that was made before the Milwaukee County Circuit Court in May of 1992 as to whether or not these two cases were in fact consolidated, as that term is used in the context of the federal sentencing guidelines." App. 21.

That the Seventh Circuit also had to address its own earlier decisions concerning functional consolidation only meant those earlier interpretations of the Guidelines complicated the interpretive task. This did not change the quality of the appellate court's work from construing the underlying terms the Sentencing Commission chose, to considering only a district court's factual determinations. Neither did it change the district court's interpretation and application of the Guideline terms into simple fact-finding. The terms at issue remained "related" and "consolidated," and this case required further explication of those terms in light of the Seventh Circuit's earlier textual construction.

3. Petitioner agrees, of course, that a district court's historical factual findings stand here absent clear error, just as they do generally. But this petition presents only a question of the proper standard of review for determinations of unrelatedness of prior convictions. The task at issue concerns at least a mixed question of interpreting and applying terms the Sentencing Commission used in Guidelines and application notes.

B. Neither Statute Nor Tradition Alter This Court's Jurisprudence On Standards of Review Here.

The mixed question at stake invites de novo review in the end, in spite of Respondent's argument. The United States starts correctly with the observation that Congress may determine an appellate standard of review. Govt. Br. 23; *see Pierce v. Underwood*, 487 U.S. 552, 558 (1988). Petitioner also agrees that history and tradition may inform the choice of a standard of review. *See, e.g., Miller v.*

Fenton, 474 U.S. 104, 115-16 (1985); Govt. Br. 23-24. But those two propositions do not lead to the conclusion that review here should be deferential, or that this Court should alter the factors consistently pointing to de novo review.

Indeed, the Sentencing Reform Act of 1984 impels the conclusion that Congress sought to adopt shorthand this Court's jurisprudence on mixed questions of law and fact, rather than to abandon or change it. More, the government's resort to the undisputed history of district court discretion in fashioning sentences has little bearing on the standard of review here. That discretionary sentencing tradition is inapposite to this narrow question because Petitioner, the Seventh Circuit, and this Court all can unite on at least one proposition: the determination of relatedness of prior convictions either is predominantly legal or predominantly factual; in no event is it discretionary.

1. As both Petitioner and the United States have noted, 18 U.S.C. § 3742(e) provides that a court of appeals "shall give due deference to the district court's application of the guidelines to the facts." Respondent contends that this provision requires deferential review of a district court's conclusion that prior convictions are unrelated because not consolidated for trial or sentencing. *See* Govt. Br. 24-25. That contention holds, the government says, even though "the Court need not classify [consolidation] as a purely factual inquiry." Govt. Br. 14.

But the government imports too much to that part of § 3742(e). In a subsection that also requires a reviewing court of appeals to determine whether a sentence "was

imposed in violation of law," 18 U.S.C. § 3742(e)(1), or "as a result of an incorrect application of the sentencing guidelines," 18 U.S.C. § 3742(e)(2), a later amendment's closing reference to "due deference" does not reasonably signal a congressional purpose to alter this Court's decisions on standards of review. If anything, it signals that appellate courts should look to that standard of review jurisprudence.

In American law the term "due" usually resembles a grammatical transitive: it needs some direct object, some context or specific application, to have sense. Standing alone it has no content. This Court tacitly acknowledged as much in a previous encounter with the § 3742(e) "due deference" provision. *See Koon v. United States*, 518 U.S. 81, 98 (1996) ("The deference that is due depends on the nature of the question presented"); *see also Braxton v. United States*, 500 U.S. 344, 350 (1991) (clearly erroneous standard applies, "when reviewing a sentence, to findings of fact;" determination of meaning and effect of a stipulation reviewed instead to determine "whether the District Court was right").

Like the terms of § 3742(e), the legislative history of the 1988 act that added the "due deference" provision suggests that Congress meant the courts to consider established norms in deciding the standard of review. Referring to that particular provision, a description of the bill included in Representative Conyers's remarks explained that,

> This standard is intended to give the court of appeals flexibility in reviewing an application of

> a guideline standard that involves some subjectivity. The deference due a district court's determination will depend upon the relationship of the facts found to the guidelines standard being applied. If the particular determination involved closely resembles a finding of fact, the court of appeals would apply a clearly erroneous test. As the determination approaches a purely legal determination, however, the court of appeals would review the determination more closely.

134 Cong. Rec. H11257 (October 21, 1988).[2]

At least one First Circuit decision that then-Judge Breyer wrote reflects the same scaled understanding of the "due deference" provision. *See United States v. Wright*, 873 F.2d 437, 444 (1st Cir. 1989) ("due deference" provision means that "in appropriate instances," a court of appeals may review a Guidelines application under a clearly erroneous standard; a decision whether a defendant is a "minor" or "minimal" participant is one such instance).

For purposes of the standard of review, this Court has explained that judicial decisions traditionally fall into three categories: questions of law (reviewed de novo); questions of fact (reviewed for clear error); and matters of discretion (reviewed for abuse of discretion). *Pierce v. Underwood*, 487 U.S. at 558. That tripartite structure does not admit mixed questions, because when settling the standard of review the Court in the end either treats

[2] Petitioner notes that the subtitle of the report section including the amendment to § 3742(e) was "Minor and Technical Criminal Law Amendments Act of 1988." 134 Cong. Rec. 11252 (October 21, 1988).

those as questions of fact or as questions of law atop historical fact findings.

The § 3742(e) "due deference" provision does no more than invoke that traditional structure for assigning standards of review. Depending on the type of judicial decision, the deference "due" will range from much (a clear error standard) to little or none (a de novo standard).

Former Assistant United States Attorney Zipperstein overstates his case, then, when he suggests that the "due deference" phrase "seems incompatible with the nature and scope of de novo review." Steven E. Zipperstein, *Certain Uncertainty: Appellate Review and the Sentencing Guidelines*, 66 S. Cal. L. Rev. 621, 636 (1992), *quoted in* Govt. Br. 14. That phrase is incompatible with de novo review only when the specific question at issue tilts so heavily factual (or discretionary) that appellate courts should not review de novo as a matter of this Court's teaching. When the question is legal, though, little deference is "due." *Compare Koon*, 518 U.S. at 98 (on some issues, like mathematical error in applying the Guidelines, "the appellate court will be in as good a position to consider the question as the district court was in the first instance"). There is no incompatibility in this scaled approach.

So the "due deference" provision of § 3742(e) prompts inquiry into the type of judicial decision under review. By itself, it does not determine the standard of review.

2. The tradition of trial court discretion in sentencing does not counsel a deferential standard of review

here, either. Relying on *Koon*, on *Williams v. United States*, 503 U.S. 193 (1992), and on *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the United States argues that, "The historical tradition of broad district court discretion in sentencing decisions also supports the conclusion that a district court's application of a Guideline to a particular set of facts should be reviewed deferentially." Govt. Br. 26. Although Petitioner agrees that district courts traditionally enjoy broad discretion in sentencing, she thinks the analogy to discretion here inapt.

Whether a district court's determination that prior convictions are unrelated is more legal (meriting de novo review) or more factual (deserving only clear-error review) is the question. Neither the court of appeals nor the parties have suggested until now that the determination of unrelatedness of prior convictions is discretionary. Quite the contrary, the court of appeals below adopted clear error as its standard, not abuse of discretion, and concluded that consolidation "is a matter of fact." App. 62.

Significantly, both *Koon* and *Williams* concerned departure decisions under the Sentencing Guidelines. *Koon* expressly adopted an abuse of discretion standard. *Koon*, 518 U.S. at 91, 100. *Williams* held that an appellate court must consider only for reasonableness those departures not resulting from error in interpreting the Guidelines, a standard comporting with abuse of discretion review. *Williams*, 503 U.S. at 202-04.

As Petitioner argued in her principal brief, a district court's departure decision comes almost at the end of the

sentencing analysis, and blends with the ultimate assessment of proper punishment. By definition, a district court departs at all from the Guideline range because the Sentencing Commission did not consider adequately some aggravating or mitigating factor, in kind or degree, and the factor "should result in a sentence different from that described." 18 U.S.C. § 3553(b).

But the task in this case, one component decision in the criminal history category determination, invokes none of the reasons for discretion embodied in deciding to depart, or in deciding an appropriate sentence within a Guideline range. Either earlier convictions were consolidated or otherwise related to one another, or they were not. That determination may be factual or it may be legal, but it is not discretionary. An analytical approach that invited district judges to exercise discretion in classifying prior convictions as related or not for criminal history purposes would wreak havoc on the uniformity goal of the Guidelines.

Even the dissenters in *Williams*, who favored less searching appellate review there, well appreciated that, "Congress intended appellate review under the new sentencing regime to guide and control the discretion long-reposed in the district courts toward the ultimate goal of sentencing reform: to promote fairness and rationality, and to reduce unwarranted disparity, in sentencing." *Williams*, 503 U.S. at 219 (White, J., dissenting).[3] This Court cannot promote proper uniformity by opening discretion

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[3] Justice Kennedy joined that dissent, and later authored the Court's opinion in *Koon*.

in predicate Guideline determinations that present no reason for discretion.

Almendarez-Torres, which concerned neither the Sentencing Guidelines nor standards of review, serviceably illustrates the proper separation between exercise of discretion in sentencing on the one hand, and predicate legal or factual determinations on the other hand. The Court there held that the fact of a prior aggravated felony, leading to a higher maximum statutory penalty, is a sentencing factor that a judge may determine, not an element of the offense in 8 U.S.C. § 1326. Nothing in the majority opinion suggested that the recidivism determination itself is discretionary. Rather, *Almendarez-Torres* implicitly recognized that determination as a factual finding, when the majority refused to decide what the standard of proof might be. 523 U.S. at 248.

Further, the *Almendarez-Torres* Court took pains to note that the finding of a prior aggravated felony, triggering a higher maximum sentence, did not impinge on a sentencing court's discretion in the way that a factor triggering a mandatory minimum sentence does. *Id.* at 244-46 (discussing *McMillan v. Pennsylvania*, 477 U.S. 79 (1986)). A mandatory minimum sentence binds a sentencing court, reducing its discretion. A higher maximum sentence arguably expands discretion, by opening a wider sentencing range. But the underlying determinant of either statutory penalty scheme owes nothing to discretion.

Accepting *Almendarez-Torres* as rightly decided,[4] that decision did not muddle discretion with fact-finding at the sentencing stage. The prior aggravated felony is a condition that the sentencing judge may find, as a factual matter, but it does not dictate what effect that judge will give it as a discretionary matter in imposing punishment within the expanded statutory range. *Almendarez-Torres* preserved a proper conceptual line between fact-finding and exercising discretion.

Whatever else it is, then, the relatedness determination here under UNITED STATES SENTENCING GUIDELINES MANUAL §§ 4A1.2(a)(2), 4A1.2 cmt. 3, and 4B1.2(c)(2), also is not discretionary. The argument that sentencing courts traditionally enjoy discretion in choosing a sentence is correct, but beside the point. Discretion lies principally in departure decisions in extraordinary cases, and in selecting a sentence within the Guideline range in typical ones. Albeit within the structure of the Guidelines, that discretion in the ultimate choice of sentence is no more or less than district courts traditionally have exercised.

3. This Court's jurisprudence on standards of review for mixed questions accordingly holds the answer to the proper standard here, not congressional directive or traditional sentencing discretion. This Court's institutional considerations do not call for deferential review as Respondent finally argues. Instead, on balance they promote independent review of this question.

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[4] The decision in *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000), preserves *Almendarez-Torres* as "at least an exceptional departure," 120 S.Ct. at 2361, but reflects continuing debate in this area.

Most of those institutional considerations, such as the primacy of court documents rather than witness demeanor here, Petitioner discussed at length in her first brief, and the United States does not refute. For that reason, Petitioner confines her reply to the factors that Respondent offers.

a. The United States posits primarily that deferential review, with decision-making more firmly lodged in district courts, better will advance uniformity. To the contrary, de novo appellate review best will achieve sentencing uniformity, because it provides meaningful precedent in an entire circuit and carries persuasive value beyond. A district judge's decision, by comparison, does not bind other judges in the same district, let alone other district judges within a circuit.

The legislative history of the Sentencing Reform Act fairly brims with concern for national uniformity in sentencing. As the 1984 Senate Report accompanying the Act explained, "These provisions introduce a totally new and comprehensive sentencing system that is based upon a coherent philosophy. They rely upon detailed guidelines for similarly situated offenders in order to provide for a greater certainty and uniformity in sentencing." S. REP. No. 98-225, at 38 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3221.

The dominant congressional focus was on disparities across all districts, not on disparities within individual districts. In the main, Congress looked inter-district, not intra-district. For example, the Senate Report compared the average sentence for bank robbery in the Northern

District of Illinois, five and one-half years, with the average sentence nationwide, eleven years. *Id.* at 41, 1984 U.S.C.C.A.N. at 3224.

Additionally, the Senate Report cited a 1972 study conducted for the United States Attorney's Office for the Southern District of New York, which found that the average prison sentence for forgery ranged from thirty months in the Third Circuit to eighty-two months in the District of Columbia Circuit; and for interstate transportation of stolen motor vehicles, from twenty-two months in the First Circuit to forty-two months in the Tenth Circuit. *Id.* at 41, 1984 U.S.C.C.A.N. at 3224 (citing Whitney North Seymour, Jr., *1972 Sentencing Study for the Southern District of New York*, 45 N.Y.S. B.J. (1973)).

Understandably, then, to achieve uniformity, Congress deployed the federal courts of appeals in their traditional law-clarifying role: "Appellate review of sentences is essential to assure that the guidelines are applied properly and to provide case law development of the appropriate reasons for sentencing outside the guidelines." *Id.* at 150, 1984 U.S.C.C.A.N. at 3333. Congress also anticipated that appellate review would supply a first interpretive gloss to ambiguous Guideline terms. "The case law that is developed from these appeals may, in turn, be used to further refine the Guidelines." *Id.* at 52, 1984 U.S.C.C.A.N. at 3235.

b. Readily available data also undermine the government's contention that courts of appeals see too few sentencing appeals to assure uniformity of application. Some 6.6% of all sentencing appeals raised the definition of related cases under § 4A1.2 in fiscal year 1999. U.S.

Sentencing Commission, 1999 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Appeals Datafile, Table 59. Since fiscal year 1996, that percentage never has dipped below 4.5% (in 1998), and has risen to as high as 7.0% (in 1997), according to the same source. And in fiscal year 1999, across all circuits, 60.6% of criminal appeals presented at least some sentencing issue. U.S. Sentencing Commission, 1999 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Appeals Datafile, Table 55. The number of cases appealed adequately allows federal appellate courts to promote uniform interpretation and application of the terms "related" and "consolidated."

More importantly, the doctrinal uniformity that appellate courts uniquely can promote depends not on the volume of relatedness appeals reaching those courts. If district courts obey the rulings of courts of appeals in their respective circuits – an assumption on which the hierarchy of federal courts largely depends – then even one clear statement of doctrine or legal interpretation on a given point ought to advance uniformity.

c. Finally, the United States contends that police officers and state judges would benefit little from the effort federal appellate courts would expend on de novo review. Whether that is true of state courts or not (and both Petitioner and Respondent only can guess), respect for comity and federalism warrants the marginal investment. Moreover, federal district judges, federal prosecutors, and defense counsel also are actors whose "primary conduct," Govt. Br. 31, independent appellate review will guide beneficially. In this federal sentencing case,

the United States overlooks those actors, who here matter more than police officers.

CONCLUSION

This Court should reverse and remand for reconsideration under a de novo standard of review. Petitioner so prays.

Respectfully submitted,

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